SUPREME COURT OF THE UNITED STATES.

No. 290.

THE GALENA, DUBUQUE, DUNLIETH AND MINNESOTA PACKET COMPANY, APPELLANTS,

vs.

SO MUCH OF THE ROCK ISLAND RAILROAD BRIDGE AS LIES WITHIN THE NORTHERN DISTRICT OF ILLINOIS; THE ROCK ISLAND RAILROAD COMPANY, THE MISSISSIPPI AND MISSOURI RAILROAD COMPANY, CLAIMANTS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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2 Pleas in the circuit court of the United States of America within and for the northern district of Illinois, held at the city of Chicago, in the district aforesaid, before the Hon. David Davis, one of the justices of the Supreme Court of the United States presiding judge, and the Hon. Thomas Drummond, district judge of said district, and associate judge of said circuit court, on Wednesday, the fourteenth day of December, in the adjourned October term of said court, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-ninth year.

WILLIAM H. BRADLEY, *Clerk.*

Appeal from district court.

THE GALENA, DUBUQUE, DUNLIETH AND MINNESOTA Packet Company
vs.
SO MUCH OF THE ROCK ISLAND RAILROAD BRIDGE, &c., as lies within the northern district of Illinois.

Be it remembered, that on the eighteenth day of April, in the year of our Lord one thousand eight hundred and sixty-four, came
3 said libellant, the Galena, Dubuque, Dunleith and Minnesota Packet Company, by Robert Rae, A. W. Arrington, and E. C. Larned, its proctors, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, its transcript of a record from the district court of the United States for the northern district of Illinois, against so much of the Rock Island Railroad bridge, &c., as lies within the northern district of Illinois, respondent, which said transcript is in the words and figures following, to wit:

Pleas in the district court of the United States for the northern district of Illinois, before the Hon. Thomas Drummond, judge of said district, and on Thursday the twenty-fourth day of March, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the eighty-eighth year.

WM. H. BRADLEY, *Clerk.*

THE GALENA, DUBUQUE, DUNLEITH AND MINNESOTA Packet Company
v.
THE ROCK ISLAND RAILROAD BRIDGE. } Libel.

Be it remembered, that on the twenty-eighth day of January,
4 A. D. one thousand eight hundred and sixty-four, the libellant, by Larned, Arrington and Ray, proctors, filed in the office of the clerk of the district court of the United States for the northern district of Illinois their libel and stipulation for costs, which said libel and stipulation reads in the words and figures following, to wit:

Libel.

To the Honorable Thomas Drummond, judge of the district court of the United States for the northern district of Illinois, in admiralty:

The libel and complaint of the Galena, Dubuque, Dunleith and Minnesota Packet Company, a corporation existing under and by virtue of the laws of the State of Illinois, and domiciled within said northern district of Illinois, owner of the steam vessels hereinafter mentioned, against so much of the bridge, its tackle, apparel, furniture, piers, stones, railroad tracks, flooring, appurtenances, and hereditaments, situate at Rock Island, in the State of Illinois, now in, upon, and over the channel of the Mississippi river, and known as the Rock Island Railroad bridge, as lies within the jurisdiction of the northern district of the State of Illinois, in a cause of damage by collision, civil and maritime, alleges as follows:

First. That during the months of April and May, in the year A. D. 1861, the libellant was the owner and still continues the
5 owner, entitled to two certain steam vessels called the Northern Light and the Grey Eagle, respectively, each of the said steam vessels being of more than twenty tons burthen, and each duly enrolled and licensed as the port of Galena, on the Mississippi river, and employed upon the said Mississippi in navigating the same and its tributaries, and engaged in the business of commerce and navigation thereupon between the different States and Territories of the United States upon said navigable stream.

Second. That the Mississippi river is an ancient stream, navigable for two thousand miles from the Gulf of Mexico to the Falls of St. Anthony, and is the boundary in whole or in part of ten of the States of the United States of America, and is by law and the public treaties of the United States a public navigable stream and common highway, free and open to all the citizens of the United States, who are each and all of them entitled by law to have the said Mississippi river kept free and open, and the right to navigate the same by sail and steam vessels and otherwise at their pleasure, free from any impediment or obstruction to the said navigation.

Third. That on or about the twenty-sixth day of April, eighteen hundred and sixty-one, the steamboat Northern Light, being a steam vessel of about seven or eight hundred tons burthen, while on
6 her voyage from St. Paul, in the State of Minnesota, a port on the Mississippi river, to St. Louis, in the State of Missouri, a port on the Mississippi river, with her cargo of freight and passengers, attempted, in the usual course of her down voyage, to pass through the draw of the said Rock Island Railroad bridge; that the said passage was attempted in the day time, the said steamboat being at the time staunch and seaworthy, and in all respects thoroughly appareled and equipped, and fully manned; that the said steamboat Northern Light was, at the time, under the immediate command of Captain John Davis, her master, and in charge of John King, a licensed pilot, then on board; that the weather was, at the time, fair and steady, with no extra or unusual wind; that in passing through

the draw of said bridge, on the Illinois side thereof, the said steamboat Northern Light, then moving at a careful and prudent rate of speed, was without any fault, negligence, misconduct, or want of care and skill on the part of the libellant, or of its agents and servants, in the management of said steamboat, or through any fault of said steamboat, thrown by the improper obstruction of navigation in said river, occasioned by the piers of said bridge in the current and channel of said river and of said bridge over said river, and at a point on said river navigable from the sea for vessels of ten tons burthen and upwards, and within the admiralty jurisdiction of the United
7 States, against the turn-table pier of the said bridge, on the starboard side of the said steamboat, with great violence, and thereby greatly injured and damaged, so that in the concussion the entire starboard guard, wheel-house, and cook-house, or a part thereof, of the said boat were torn off and went overboard, and her cabin and machinery were partially thrown over upon her larboard side, and said steamboat, in other material respects, with her machinery, tackle, and furniture was, by reason of said collision and not otherwise, greatly injured and damaged; that by means thereof the said voyage of the said steamboat was interrupted, to the great loss of the libellant, and the said libellant was thereby deprived of the use of the said steamboat for the space of eighteen days, and was obliged to expend and did expend in the partial and temporary repair of the said steamboat, made alone necessary by reason of said collision, the sum of one thousand three hundred and twenty-four dollars and seventy-four cents, but which repairs did not make the said boat as good as before said injury, but on the contrary thereof, the said boat remained, after said repairs and now remains, listed and careened over to the larboard, and not on an even keel, in consequence of which said steamboat necessarily draws more water, and her capacity and usefulness in the Mississippi navigation is greatly decreased, and the said boat rendered of less value than before said injury
8 by the sum of three thousand dollars, in addition to said expenditures for partial repairs; and the said libellant has also been deprived of great gains and profits which the said steamboat could and would have earned but for such damage and injury, which demurrage, for said eighteen days, would, as the libellant alleges, have amounted to at least the sum of three thousand six hundred and eighty-two dollars and eight cents, or at least two hundred and four $\frac{56}{100}$ dollars per day, over and above all deductions.

Fourth. That on or about the ninth day of May, eighteen hundred and sixty-one, the steamboat Grey Eagle, the property of the libellant as aforesaid, being a steam vessel of about six hundred tons burthen, while on her voyage from Saint Paul, in the State of Minnesota, on the Mississippi river, to Saint Louis, in the State of Missouri, a port on the Mississippi river, with her cargo of freight and passengers, attempted in the usual course of her down voyage to pass through the draw of the said Rock Island Railroad bridge; that the said passage was attempted in the daytime, the said steamboat Grey Eagle being at the time staunch and seaworthy, and in all respects thoroughly ap-

parelled and equipped, and fully manned; that the said steamboat Grey Eagle was at the time under the immediate command of Captain D. S. Harris, her master, and in charge of a licensed river
9 pilot then on board; that the weather was at the time fair and steady, with no extra or unusual wind; that on attempting to pass through the draw of said bridge, on the Illinois side thereof, the said steamboat Grey Eagle, then moving at a careful and prudent rate of speed, and without any fault, negligence, misconduct or want of care and skill on the part of the libellant or its agents and servants in the management of the said steamboat, or through any fault of said steamboat, was thrown, solely by the improper obstruction and impediment in the way of navigation in said river occasioned by the piers of said bridge in the current and channel of said river, and of said bridge over said river, and at a point on said river navigable from the sea for vessels of ten tons burthen and upwards, and within the admiralty jurisdiction of the United States, against the small pier of said bridge, on the larboard side of the said steamboat, and with such great force that said steamboat came in collision with said pier, and, notwithstanding great skill and seamanship on the part of those in charge of said boat were exerted to prevent it, struck the same forward of her engine on the larboard side, and with such violence, damage and injury that the said boat immediately sunk, and went down in about twenty-five feet of water, (that being the depth of water at that point at the time) with all furniture, tackle, apparel, cargo, and passengers, and so suddenly that her passengers, of whom
10 there were some thirty or forty on board, were thrown into the water and forced to swim for their lives, and from among whom some five or six in number were unavoidably drowned; that said steamboat had on board at the time aforesaid about three or four hundred tons of freight of the value of

, to be delivered at St. Louis or other ports below Rock Island, the unpaid charges upon which for transportation have amounted to at least the sum of three thousand five hundred dollars; that the damage and injury to the said steamboat was so violent, and her sinking so rapid, that no part of her cargo or other property on board could be saved, and the said steamboat, with her tackle, apparel, furniture, machinery and cargo became and was by reason of said collision a total loss, except some articles of furniture fished up of small value, and that the damage to the said libellant in the loss of the said boat, with her tackle, apparel and furniture amounts, as the libellant alleges, to at least the sum of thirty thousand dollars, over and above the said unpaid freight, and of the cargo in the sum of $25,000.

Fifth. That an account of said damage, injury, demurrage and losses
is hereto annexed, marked schedule A, and is made a part
11 of this libel; that libellant has frequently demanded the settlement and payment of the said damage, injury, demurrage and losses of the owners, agents and superintendents of the said railroad bridge; that the owners, agents, or superintendents of said railroad bridge have not paid the same, but have wholly neglected so to do, and the whole amount thereof remains unpaid and due to libel-

lant, in the sum of seventy-one thousand five hundred and six dollars and seventy-two cents, with interest, by way of damages to be computed to the time of final decree in this court or any appellate court.

Sixth. That a great portion of said Rock Island Railroad bridge now within the jurisdiction of this honorable court.

Seventh. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the honorable court.

Wherefore libellant prays that process in due form of law, according to the course of this honorable court in cases of admiralty and maritime jurisdiction, may issue against so much of the said Rock Island Railroad bridge, its tackle, apparel, furniture, piers, stones, railroads, tracks, flooring, appurtenances, and hereditaments as lies within the jurisdiction of the State of Illinois, and that the said owners, agents, and superintendents Rock Island Railroad bridge, and all persons claiming any right, title or interest in the said bridge, may be
12 cited to appear and answer upon oath all and singular the matters aforesaid, and that so much of the said bridge as lies within the jurisdiction of this honorable court may be condemned and sold to pay the amount due to the libellant, with interest and costs, and that the libellant may have such other and further relief as in law or justice it may be entitled to receive.

Galena, Dubuque, Dunleith & M. Packet Co.

ORRIN SMITH, *President.*
ROBERT RAE, *Proctor.*
A. W. ARRINGTON, *Advocate.*
E. C. LARNED, *Advocate.*

Sworn this 19th day of January, A. D. 1864, before me.

R. RAE, *U. S. Com.*

Schedule A.

Steamboat Northern Light, on voyage from Saint Paul to Saint Louis:

Damages for repairs	$1,324 74
Injury to boat	3,000 00
Demurrage, 18 days, $204 56 per diem	3,682 08
	8,006 72

Steamboat Grey Eagle, on voyage from Saint Paul to Saint Louis:

Loss of freight	$3,500 00
Loss, total, of boat	35,000 00
	38,500 00
13 Loss of cargo	25,000 00
	63,500 00

Resume.

S. B. N. L., damages for repairs	$1,324 74
Injury to boat	3,000 00
Demurrage, 18 days, $204 56 per diem	3,682 08
S. B. G. E., loss of	35,000 00
Loss of freight	3,500 00
	46,506 72
Loss of cargo	25,000 00
	71,506 72

Endorsed: Filed Jan'y 28th, 1864.

WM. H. BRADLEY, *Cl'k.*

Stipulation for costs.

District court, February term, A. D. 1864,

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

Whereas a libel was filed in this court on the day of , A. D. 1864, by the Galena Dubuque, Dunleith and Minnesota Packet Company against the Rock Island Railroad bridge, its tackle, apparel, furniture, piers, stones, railroads, tracks, flooring, appurtenances and hereditaments, for the reasons and causes in the said libel mentioned, and praying that the same may be condemned and sold to answer the prayer of the libellant, and the
14 said libellant, and Robert Rae, its surety, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the libellant or its surety, execution may issue against their goods, chattels and lands for the sum of two hundred and fifty dollars; now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and are bound in the sum of two hundred and fifty dollars, conditioned that the libellant above named shall pay all such costs as shall be awarded against it by this court, or, in case of appeal, by the appellate court.

Galena, Dubuque, D. &. M. Packet Co., Orrin Smith, President.

ORRIN SMITH.

ROB'T RAE.

Taken and acknowledged this 22d day of January, A. D. 1864, before me.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, Robert Rae, party to the above stipulation, being duly sworn, depose and say that I reside in the northern district of Illinois, and am worth the sum of five hundred dollars over and above all my debts and liabilities.

R. RAE.

15 Sworn this 28th day of Januany, A. D. 1864, before me.

WM. H. BRADLEY, *Clerk.*

Endorsed: Filed Jan'y 28th, A. D. 1864.

WM. H. BRADLEY. *Clerk.*

And thereupon a monition issued out of the clerk's office of said district court, which, with the marshal's return thereon endorsed, is in the words and figures following, to wit :

Monition.

THE UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

The United States of America to the marshal of the northern district of Illinois, greeting :

Whereas a libel hath been filed in the district court of the United States in and for the northern district of Illinois, on the 28th day of January, in the year of our Lord one thousand eight hundred and sixty-four, by the Galena, Dubuque, Dunlieth and Minnesota Packet Company, against so much of the bridge, its tackle, apparel, furniture, piers, stones, railroad tracks, flooring, appurtenances, and hereditaments, situate at Rock Island, in the State of Illinois, now in, upon and over the channel of the Mississippi river, and known as the Rock Island Railroad bridge, as lies within the jurisdic-
16 tion of the northern district of Illinois, in a cause of collision, &c., for reasons and causes in said libel mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons having or pretending to have any right, title or interest therein may be cited to appear and answer, all and singular, the matters in said libel articulately propounded, and that this court would be pleased to pronounce for the sum of seventy-one thousand five hundred and six dollars and seventy-two cents the damages alleged in said libel, besides costs of suit. You are therefore commanded to attach so much of said Rock Island Railroad bridge, so described as aforesaid, to detain the same in your custody until the further order of this court respecting the same, and to give due notice by publication in some daily newspaper printed and published in the city of Chicago, for fourteen days previous to the day of trial, and by notice posted up in the most public manner for the space of fourteen days at or near the place of trial, of such seizure and libel, to all persons claiming the said part of said railroad bridge so described as aforesaid, or knowing or having anything to say why this court should not pronounce against the same according to the prayer of the said libel, and that they be and appear before the said court, to be held in and for the northern district of Illinois,
17 at the United States court-room in the city of Chicago, in said district, on the first Monday in March next, if that be a day of jurisdiction, if not, then on the first day of jurisdiction thereafter, at 10 o'clock in the forenoon of that day, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return, together with this writ.

Witness the honorable Thomas Drummond, judge of the said court, this 28th day of January, in the year of our Lord one thousand eight hundred and sixty-four, and of our independence the 88th year.

[L.S.] WM. H. BRADLEY, *Clerk.*

Marshal's return.

Executed this writ by attaching so much of the Rock Island Railroad bridge and fixtures as lays in my district, this 30th day of January, A. D. 1864.

J. R. JONES,
U. S. Marshal, N. District Ill.,
By P. MUNSON, *Deputy.*

Public notice is hereby given that on the 28th day of January, A. D. 1864, a monition issued out of the clerk's office of the District court of the United States for the northern district of Illinois in a cause of collision, &c., wherein the Galena, Dubuque, Dunlieth
18 and Minnesota Packet Company is libellant against so much of the bridge, its tackle, apparel, furniture, piers, stones, railroad tracks, flooring, appurtenance, and hereditaments situate at Rock Island. in the State of Illinois, now in, upon and over the channel of the Mississippi river, and known as the Rock Island Railroad bridge, as lies within the jurisdiction of the northern district of Illinois, by virtue of which I have taken the same into custody. The said monition is returnable on the first Monday of March, A. D. 1864, when, if that be a day of jurisdiction, (or if not, then on the next day of jurisdiction,) a hearing will be had of the cause. All persons claiming the said part of said railroad bridge and of its tackle, apparel, furniture, piers, stones, railroad tracks, flooring, appurtenances and hereditaments, or knowing or having anything to say why the said court should not pronounce against the same according to the prayer of the libel in said cause, are required then to interpose their claim, if any they have, otherwise the same will be pronounced against as prayed for in the libel.

Chicago, January 30, 1864.

J. R. JONES,
U. S. Marshal, Northern District of Illinois,
By P. MUNSON, *Deputy.*

Endorsed: Filed this 31st day of January, A. D. 1864.
WM. H. BRADLEY, *Clerk.*

19 *Petition.*

And afterwards, to wit, on the 15th day of March, A. D. 1864, the Mississippi and Missouri Railroad Company, the Chicago and Rock Island Railroad Company, and Azariah C. Flagg, by Cook & Campbell, their proctors, filed in the office of the clerk of said district court aforesaid their petition to intervene for their rights herein, which reads in the words and figures following, to wit:

To the Hon. Thomas Drummond, judge of the district court of the United States for the northern district of Illinois:

The Mississippi and Missouri Railroad Company, the Chicago and Rock Island Railroad Company, and Azariah C. Flagg, severally, having the rights set forth in schedules A, B, C, D and E, hereto annexed, severally claim to intervene for their aforesaid several rights and interests in said cause, and state they have the several rights and interests in said schedule set forth, and that no other person has the

same. And thereupon the said claimants severally pray that this honorable court will be pleased to decree a dismission of said libel, and otherwise right and justice to administer in the premises.

THE MISSISSIPPI AND MISSOURI RAILROAD COMPANY,
By JOHN F. TRACY, *its Attorney in fact.*
20 THE CHICAGO AND ROCK ISLAND RAILROAD COMPANY, *its Attorney in fact.*
AZARIAH C. FLAGG, *his Attorney in fact.*

Schedule A.—The bridge charter.

An act to incorporate a bridge company by the title hereinafter named.

SECTION 1st. *Be it enacted by the people of the State of Illinois represented in the general assembly*, That Joel A. Mattison, Joseph E. Sheffield, Norman B. Judd, and Henry Farnham, their associates, successors, heirs and assigns, be and they are hereby created a body corporate by the name and style of the Railroad Bridge Company, with power to build, maintain and use a railroad bridge over the Mississippi river, or that portion within the jurisdiction of the State of Illinois at or near Rock Island, in such manner as shall not materially obstruct or interfere with the free navigation of said river, and to connect by a railroad or otherwise such bridge with any railroad, either in the State of Illinois or Iowa, terminating at or near said point, to unite and consolidate its franchises and property with any and all
21 bridge or railroad companies in either of said States; to fix the amount of capital stock; to divide, transfer, and increase the same; to borrow money and pledge or mortgage its property and franchises; to condemn, according to law, property for the uses and purposes of said company; to contract, bargain and agree with any such railroad companies for and in the construction and maintenance of such bridge; to sell or lease said bridge, or the use of the same, or the franchises of said company, to any companies or corporation, provided the said company shall commence said bridge within two years, and shall complete the same within six years from the passage of this act.

SEC. 2d. This act to take effect and be in force from and after its passage.

Approved January 7th, 1853.

Schedule B.—The lease from the Railroad Bridge Company to the Chicago and Rock Island Railroad Company.

This indenture, made this 8th day of September, in the year of 1853, between the Railroad Bridge Company of the first part, and the Chicago and Rock Island Railroad Company of the second part, witnesseth: That said party of the first part, in consideration of
22 the covenants hereinafter contained, to be performed by said party of the second part, doth hereby demise and lease to said party of the second part all the powers, rights, privileges, purchases of property vested in or conferred upon said party of the first part

by an act of the general assembly of the State of Illinois, entitled "An act to incorporate a bridge company by the title therein named," approved January 17, 1853, to be forever hereafter used, exercised and enjoyed by said party of the second part, in the name of the said party of the first part, by and under the superintendence and direction of the said party of the second part, its officers and agents, this demise being subject to such rights as the Mississippi and Missouri Railroad Company may acquire by virtue of a contract to be entered into with it under a resolution hereafter adopted by the said party of the first part. And said party of the second part hereby covenants and agrees to and with said party of the first part, that it will, at its own proper costs and charge, proceed immediately with the construction of the bridge contemplated by and provided for in said act, and, jointly with the Mississippi and Missouri Railroad Company, complete the same according to the provisions, true intent,
23 and meaning of said act, and forever afterwards maintain the same. And the said party of the second part hereby further covenants to and with the said party of the first part, that it will fully perform, fulfill, and keep all contracts that may be entered into by said party of the first part to and with the Mississippi and Missouri Railroad Company, for the joint construction, maintenance and use of said bridge; that it will fully indemnify, save and keep harmless the said party of the first part from all costs, charges, expenses, damages, suits, actions and causes of action in any manner arising from or growing out of the construction, maintenance and use of said bridge, or the exercise of any of the franchises, rights and privileges herein and hereby demised.

In witness whereof, the said parties have caused their respective corporate seals to be hereunto affixed, and the signatures of their presidents and secretaries to be subscribed, the day and year first above written.

Schedule C.—The agreement between the Railroad Bridge Company and the Mississippi and Missouri Railroad Company, dated December 26th, 1853.

This agreement, made this 26th day of December, in the
24 year of our Lord one thousand eight hundred and fifty-three, between the Mississippi and Missouri Railroad Company, a corporation under and by virtue of the laws of Iowa, of the first part, and the Railroad Bridge Company, a corporation created by a law of the State of Illinois, of the second part—

Witnesseth: That whereas, by the provisions of the articles of association, and the laws of the State of Iowa, said party of the first part have, among other things, full power and authority to construct a railroad from the eastern line of the State of Iowa, to Council Bluffs, and to bridge all streams and water-courses between the termini of said road, the eastern terminus of which said railroad line is the centre or thread of the Mississippi river.

And whereas said party of the second part, under its act of incorporation, is fully authorized to construct a railroad bridge at or near

Rock Island, across so much of the Mississippi river as is within the State of Illinois, and unite its said bridge and franchise with any railroad company or corporation, and join in the construction of a railroad bridge across the Mississippi river at Rock Island.

Now, therefore, in consideration of the premises, said parties agree to unite in the construction of a railroad bridge across the Mississippi river at Rock Island, so much of said bridge as is within the
25 State of Iowa to be a part and parcel of the railroad of the said party of the first part, and so much of said bridge as is within the State of Illinois to be property of said party of the second part, upon the following terms and conditions, viz:

First. Said parties shall each respectfully contribute and pay one-half part of the costs and expense of erecting, repairing, maintaining and operating said bridge.

Second. That the location and construction of said bridge, and all contracts and expenditures in connection therewith, shall be under the charge and management and control of Henry Farnam, a chief engineer, and that he shall have associated with him John B. Jervis, esq., as consulting engineer, until said parties shall mutually hereafter agree to change this provision.

Third. The manner of using said bridge shall be determined by said parties or their assigns, by mutual agreement, and in case of any disagreement, such matter of disagreement shall be referred to three disinterested and competent engineers as commissioners, one to be selected by each of said parties or its assigns, and the third by the two so chosen, and the award in writing of any two of said commissioners shall be final and binding upon the respective parties.

Fourth. Each party contracts with the other that they will
26 pay in the proportions above stated, as the same may be required from time to time, all estimates and expenditures incurred in the erection and maintenance of said bridge, upon presentation of the certificate of said chief engineer showing the amount so required of either party.

In witness whereof, said parties have hereunto affixed their corporate seals and caused these presents to be signed by their president and secretary, the day and year first above written.

[SEAL.] JOHN A. DIX,
President Miss. & Mo. R. R. Co.
JOHN E. HENRY,
Sec'y Miss. & Mo. R. R. Co.
[SEAL.] HENRY FARNAM,
President Railroad Bridge Co.
N. B. JUDD,
Sec'y R. R. Bridge Co.

Schedule D.—The agreement by and between the C. & R. I. R. R. Co., the M. & M. R. R. Co., and the Railroad Bridge Co., December, 1854.

This agreement, made this day of December, in the year of our Lord one thousand eight hundred and fifty-four, between the Chicago

and Rock Island Railroad Company, party of the first part, and the Mississippi and Missouri Railroad Company, party of the second part, and the Railroad Bridge Company, party of the third part,
27 witnesseth: That whereas the said party of the third part, has, at the request of the said parties of the first and second part, agreed to issue three hundred bonds for the sum of one thousand dollars each, payable at the Mechanics' Bank, in the city of New York, on the 10th day of January, in the year 1870, bearing interest at the rate of 10 per cent. per annum, and payable semi-annually at the office of the Chicago and Rock Island Railroad Company, in the city of New York, the payment of which said bonds, together with the interest thereon at the several times when payable, have been separately guaranteed by the said parties of the first and second parts; and whereas the said bonds are to be issued for the joint benefit of the said parties of the first and second part to raise funds to construct a railroad bridge across the Mississippi river, and a railroad track connecting therewith across the island of Rock Island, for the joint use of said parties of the first and second part:

Now, therefore, the said party of the first part hereby covenants and agrees to and with said party of the third part, that it will pay to the said party of the third part, one-half part of the semi-annual interest on said bonds as the same become due, at the time and place where the same is payable, viz: the sum of $7,500 on each of the 10th days of July and January in each year that said
28 bonds are to run, the first payment to be made on the 10th day of July, in the year 1855, and the last on the 10th day of January, in the year 1870, and one-half part of the principal of said bonds when the same becomes due, at the time and place when and where the same is made payable, viz: the sum of $150,000 on the 10th day of January, in the year 1870; and the said party of the second part covenants and agrees to and with the said party of the third part that it will pay to the said party of the third part one-half part of the semi-annual interest on said bonds as the same becomes due, at the time and place when and where due, at the time and place when and where the same is made payable, viz: the sum of $7,500 on each of the 10th days of July and January in each year that said bonds are to run, the first payment to be made on the 10th day of July, in the year 1855, and the last on the 10th day of January, 1870, and one-half part of the principal thereof when the same becomes due, at the time and place when and where the same is made payable, viz: the sum of $150,000 on the 10th day of January, in the year 1870.

And it is mutually and severally agreed by said parties of the first and second part, that in case either of the said parties shall neglect or fail to pay any one of said sums above covenanted to be paid by either of said parties, then and in such case the said party of
29 the third part shall hold, retain and keep possession, control and use of said bridge, with the railroad connected therewith, for the sole and separate use of the party that does not fail to pay, until the said party thus failing or neglecting shall have paid the amount in arrear, with interest, cost and damages.

And the said party of the second part hereby demises and leases to said party of the third part, so much of its track and station grounds on the north bank of the Mississippi, together with full right and power to lay down all such side tracks, switches, turnouts, and turn-tables as may be necessary and requisite to enable said party of the third part to properly, successfully and conveniently operate and use said bridge, with full right of ingress, egress and regress through, from and upon its said station grounds. This demise and lease to take effect and be in force from and at each of the times of any failure to pay interest or principal as herein covenanted, and to continue until such default is compensated as hereinbefore provided. And said party of the second part hereby covenants and agrees to and with said party of the third part that it will, upon request, make all such further and different deeds, conveyances and assurances and leases as may be found necessary to fully vest in said party of the third part full right and power to use, operate, and enjoy said bridge and
30 station accommodations as herein provided, in case of default in making the payments herein provided for; and said party of the first part hereby covenants and agrees to and with said party of the third part that, in case of a failure on its part to pay as hereinbefore provided, so that the use of said bridge and railroad shall be held by the party of the third part for the use of the said party of the second part, *that* it will furnish on its station grounds at the east side of the Mississippi river enough and sufficient room and accommodation for the said party of the third part to covenant, by properly and successfully operate and use said bridge and railroad, and for all such side tracks, turnouts, switches and turn-tables as may be necessary to the proper and convenient use of said bridge, with full right of ingress, egress and regress through, from and upon its said station grounds. It is mutually covenanted that in case of disagreement between any of said parties as to the use of said station grounds or the quantity required for the successful use of said bridge and road in the contingency hereinbefore provided for, that such question of disagreement shall be referred to three impartial and disinterested engineers, one of whom shall be chosen by the said party of the third part, and another by the other party to such disagreement,
31 and the two so selected shall choose a third person, and the decision of any two of such persons, communicated in writing to said parties, shall be final and conclusive upon the question. And in case either party shall neglect or refuse to select a commissioner on its behalf for the space of ten days after being requested in writing so to do, that then the judge of the district court of the State of Iowa shall have full power to make such appointment for such party, and the person so appointed shall have the like power and authority in every respect as though chosen and selected by the party. And the said party of the third part covenants and agrees to and with said parties of the first and second parts, severally and jointly, that it will apply and pay to and in extinguishment and satisfaction of the interest and principal of said bonds all such sums of money as may be paid by either of said parties on account thereof, and that in case o

default in the payment hereinbefore specified, that then and in such case it will hold the said bridge and railroad to and for the sole and separate use of the party not making default.

In witness whereof, the said several parties have hereto set their respective corporate seals, and caused the signatures of their
32 presidents and secretaries to be hereto subscribed, the day and year first above named.

Schedule E.

This indenture, made this eleventh day of June, in the year of our Lord one thousand eight hundred and fifty-five, between the Railroad Bridge Company, a body corporate created by an act of the legislature of the State of Illinois approved on the seventeenth day of January, eighteen hundred and fifty-three, of the first part, and Azariah C. Flagg, of the city, county, and State of New York, of the second part, witnesseth: Whereas said party of the first part, for the purpose of raising funds from time to time for the construction, completion, and maintenance of a railroad bridge across the Mississippi river at Rock Island, in the State of Illinois, have executed and delivered three hundred bonds, and propose to issue in addition thereto such number as may be deemed necessary, not exceeding in the whole, inclusive of those already issued, four hundred bonds, and thereby became indebted unto divers persons and bodies corporate in a sum not exceeding four hundred thousand dollars, which said bonds
33 are for the payment of one thousand dollars each, bearing interest at the rate of ten per cent. per annum, and payable semi-annually on the tenth day of July and January in each year, at the office of the Chicago and Rock Island Railroad Company, in the city of New York, and the principal thereof payable at the Mechanics' Bank, in the city of New York, on the tenth day of January, eighteen hundred and seventy, the payment of which said bonds is guaranteed by the Chicago and Rock Island Railroad Company and the Mississippi and Missouri Railroad Company, severally, by an endorsement thereon under their respective seals and the signatures of the proper officers of said companies, which said bonds are in the following form:

The Railroad Bridge Company acknowledge themselves to owe to Wm. B. Ogden, or bearer, one thousand dollars, which sum said company promise to pay to the said W. B. Ogden, or to the holder thereof, of the Mechanics' Bank, in the city of New York, on the tenth day of January, 1850, and also interest thereon at the rate of ten per cent. per annum, semi-annually on the tenth day of each July and January ensuing the date thereof, until the said principal sum shall be paid, on the presentation of the annexed interest warrants
34 at the office of the Chicago and Rock Island Railroad Company in the city of New York. And said company further agree that this obligation, and all rights and benefits arising therefrom, may be transferred by general or special endorsement, or by delivery, as if the same were a note of hand and payable to bearer.

In testimony whereof, the said company have hereunto caused to be affixed their corporate seal, and these presents to be subscribed by their president and treasurer, this tenth day of January, 1855.

[SEAL.] HENRY FARNUM, *President.*

JOSEPH E. SHEFFIELD, *Treasurer.*

Now, therefore, this indenture witnesseth: that said party of the first part, for the further securing said sums of money mentioned in said bonds, and each and every of them, with the interest thereon, according to the true intent and meaning thereof, and also in consideration of one dollar in hand paid by said party of the second part at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have and do hereby grant, bargain, sell, remise, release, convey, and confirm unto the said party of the second part, and his heirs and assigns forever, all and singu-
35 lar the bridge across both channels of the Mississippi river at Rock Island, with the roadway across the island of Rock Island, and also of the station grounds, depots, side-tracks, turnouts, and also all the property, rights, interest, and franchise of every name, kind, and description belonging to said party of the first part, or in which it has any interest, to have and to hold all and singular the property, interests, and franchises hereby granted unto the said party of the second part, his successors and assigns forever, upon and subject to the following trust:

First. That the actual possession, use. management, and control of said property, with all the appurtenances to it belonging, shall be and remain with the party of the first part, without any molestation or interference of the party of the second part, so long as the said bonds or obligations shall remain without default or forfeiture, and said party of the first part shall perform and keep the stipulations thereof.

Second. That if default shall be made in the payment of either principal or interest of said bonds hereinbefore referred to and hereby secured, or either of them, or any part thereof, for the space
36 of thirty days after the same shall become due and payable according to the conditions thereof, that then and in such case it shall and may be lawful for the said party hereto of the second part, or his successors, upon the request in writing of any one of the holders of said bonds in which either the principal or interest shall remain due and unpaid for the space of thirty days, to enter into and upon and to take possession of all and singular the premises, franchises, rights, property, and effects hereby transferred or intended so to be, including all the property hereinbefore mentioned, and by himself or his agent to take and receive thereafter the accruing income and profits of the said property and other things hereby transferred, for the purpose of the security hereinbefore declared, with power and authority to sell and dispose of the said premises, franchises, property, and effects, or of so much thereof as shall be necessary to pay the sums remaining unpaid on said bonds hereby secured, and all benefit and equity of redemption of the said party of the first part

therein, at public auction, first giving ninety days' notice of such sale by publication in three public newspapers, one of which shall
37 be in the city of New York; and as the attorneys of the said party hereto of the first part, for that purpose by these presents duly constituted and appointed to make and deliver to the purchaser or purchasers thereof good and sufficient deed or deeds of conveyance or transfer of the same, and out of the moneys arising from such sale to retain and apply so much thereof as shall be necessary to discharge the principal and interest unpaid on all of said bonds, upon the principle of *pro rata* distribution, together with all the costs of advertisements and the expenses incident to the said sale, rendering the surplus of said purchase money, after payment of the said bonds hereby secured and of the said costs, to the said party thereto of the first part, its successors or assigns ; which sale shall be a perpetual bar of all claims or equity of redemption of the said party hereto of the first part, and all persons claiming by, from, or under said party of the first part. And the said Chicago and Rock Island Railroad Company and the Mississippi and Missouri Railroad Company, as parties of the third part, in consideration of the premises and of one dollar to them in hand paid, have and do hereby grant and convey to said party of the first part all the property, rights and interest that they may have in and to the premises hereinbefore described, for the
38 purpose and to the intent of conferring upon said party of the first part full power to convey the property aforesaid, upon the trust and for the security aforesaid, and do herein and hereby fully assent to the conveyance herein made to the said party of the second part, to have and to hold the same unto the said party of the second part, his successors and assigns, upon the trust and for the uses and purposes before expressed. And it is further agreed that the said party of the first part and third part, their successors, and all and every person or persons whomsoever, lawfully or equitably deriving any estate, right, title, or interest of, in or to the premises hereinbefore granted by, from and under, or in trust for them, shall and will, at any time or times hereafter, upon the reasonable request and at the proper costs and charges in the law of the said party of the second part, his successors and assigns, make, do and execute, and cause to be made, done and executed, all and every such further and other reasonable acts, conveyances, and assurances in the law, for the better and more effectually resting and confirming the premises hereby granted, or intended so to be, in and to the said party of the second part, his heirs or assigns, or his counsel learned in the law,
39 shall be reasonably devised, advised or required. And it is hereby covenanted and agreed by the parties hereto that in the event of the death, resignation, or incapacity to act of the trustee herein, that the judge of the district court of the United States in and for the district of Illinois, shall have full power, upon the request in writing of the parties interested, to appoint, by writing, under his hand and seal, a successor to the said party of the second part, and the successor so appointed shall possess all the title, right, and power, and perform the trust imposed and conferred herein and hereby upon said party of the second part.

In witness whereof, the said parties have hereunto affixed their official seals and caused the signatures of their presidents and secretaries to be hereunto subscribed, the day and year first above written.

HENRY FARNUM, *Pres't R. R. Bridge Co.* [SEAL.]
N. B. JUDD, *Sec'y R. R. Bridge Co.* [SEAL.]
HENRY FARNUM, *Pres't C. & R. I. R. R. Co.* [SEAL.]
F. H. TOWS, *Sec'y C. & R. I. R. R. Co.* [SEAL.]
JOHN A. DIX, *Pres't M. & M. R. R. Co.* [SEAL.]
H. PRICE, *Sec'y M. & M. R. R. Co.* [SEAL.]

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

40 John F. Tracy, being duly sworn, says that the matters and things set forth in the foregoing claim are true in substance; that he has signed the same for and in behalf of the several claimants therein mentioned, and that he is thereunto authorized by said claimants and each of them.

JOHN F. TRACY.

Sworn and subscribed before me this 15th day of March, A. D. 1864.
WM. H. BRADLEY, *Cl'k.*

Endorsed: Filed March 15th, 1864.
WM. H. BRADLEY, *Clerk.*

And said claimants also, on the 15th day of March, A. D. 1864, filed their stipulations for costs in the words and figures following, to wit:

Stipulation for costs.

District court, March term, A. D. 1864.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Whereas a libel was filed in this court on the twenty-eighth day of January, A. D. 1864, by the Galena, Dunleith and Minnesota Packet Company against the Rock Island Railroad bridge, for the
41 reasons and causes in said libel mentioned; and whereas a claim has been filed in the said cause by the Mississippi and Missouri Railroad Company, the Chicago and Rock Island Railroad Co., and Azariah C. Flagg, claimants, and the said claimants severally, and John F. Tracy, surety, the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the claimants or their surety, execution may issue against their goods, chattels and lands for the sum of two hundred and fifty dollars: Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and are bound in the sum of two hundred and fifty dollars, conditioned that

the claimants above named shall pay all such costs as shall be awarded against them or either of them by this court, or, in case of appeal, by the appellate court.

The Mississippi & Missouri Railroad Company, by—
JOHN F. TRACY, *its Attorney in fact.*
The Chicago and Rock Island Railroad Company, by—
JOHN F. TRACY, *its Attorney in fact.*
AZARIAH C. FLAGG,
By JOHN F. TRACY, *his Attorney in fact.*

42 Taken and acknowledged this 15th day of March, A. D. 1864, before me.
[SEAL.] DANIEL DUTCHER, *Notary Public.*

NORTHERN DISTRICT OF ILLINOIS, *ss:*

John F. Tracy, of Chicago, party to the above stipulation, being duly sworn, deposes and says that he resides in the northern district of Illinois, and is worth the sum of five hundred dollars over and above all his debts and liabilities.

JOHN F. TRACY.

Sworn this fifteenth day of March, A. D. 1864, before me.
[SEAL.] DANIEL DUTCHER, *Notary Public.*

Endorsed: Filed March 15th, 1864.
WM. H. BRADLEY, *Cl'k.*

And also, on the 15th day of March, A. D. 1864, said claimants, by their said proctors, come and file their exceptions to the libel in this behalf, in the words and figures following, to wit:

Exceptions.

43 To the honorable Thomas Drummond, judge of the district court of the United States for the northern district of Illinois:

The several exceptions of the Mississippi and Missouri Railroad Company, the Chicago and Rock Island Railroad Company, and Azariah C. Flagg, claimants, to the libel of the Galena, Dubuque, Dunlieth and Minnesota Packet Company, libellant, severally allege that the said libel is informal and insufficient, as follows:

First. This honorable court has no jurisdiction to proceed against the property in said libel mentioned, in the manner in which the same is sought to be proceeded against by the libel. And therefore the said claimants severally pray that the said libel may be dismissed with costs.

COOK & CAMPBELL,
Proctors for the several Claimants.

Endorsed: Filed March 15, 1864.
WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 24th day of March, A. D. 1864, come the libellants, by their said proctors, and filed their motion to dismiss the claimants' claim filed herein, in the words and figures following, to wit:

44 *Motion to dismiss claim.*

THE GALENA, DUBUQUE, DUNLEITH AND MINnesota Packet Co.
v.
ROCK ISLAND R. BRIDGE CO.

And now comes the libellant, by his proctor, and moves that the court would be pleased to dismiss the claim of the claimants in this cause, for the reason—

I. Because said parties, claiming to intervene for their respective interests, have not first obtained permission of the court before filing and asserting their said claim, according to the course of admiralty proceeding.

II. Because said parties, claiming to intervene as aforesaid, have not propounded the matter relied upon by them in suitable allegations, in order that libellant may make due answer, if so required by the order of the court.

III. Because said parties, claiming as aforesaid, have neither obtained permission of the court to intervene, nor propounded suitable allegations as aforesaid, nor have they given any stipulation with sureties to abide by the final decree rendered in the cause,
45 and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court, as required by the 34th rule of the U. S. Supreme Court.

IV. For want of the affidavit required by the 26th rule of said court.

ROB'T RAE, *Proctor for Libellant.*

Endorsed: Filed March 24th, 1864.

WM. H. BRADLEY, *Cl'k.*

And afterwards, to wit, on the 24th day of March, A. D. 1864, being of the March term of said court, for the year last aforesaid, the following proceedings were had in said cause in said court, to wit:

THE GALENA, DUBUQUE, DUNLEITH AND MINnesota Packet Company
v.
THE ROCK ISLAND RAILROAD BRIDGE. } Libel.

Now come the parties, by their proctors, and thereupon the libellant moves the court to dismiss the claim of the Mississippi and Missouri Railroad Company, the Chicago and Rock Island Rail-
46 road Company, and Azariah C. Flagg, filed herein; which, after argument, the court overrules; to which ruling of the court the libellant excepts; and thereupon comes on to be heard the

exceptions of the claimants to the libel filed herein which, after argument, the court sustains pro forma, and dismisses the libel; and thereupon the libellants pray an appeal.

Appeal.

And afterwards, to wit, on the 31st day of March, A. D. 1864, the libellants, by their proctor, came, and filed in said clerk office aforesaid their appeal in the words and figures following, to wit:

Circuit court of the United States, northern district of Illinois.

THE GALENA, DUBUQUE, DUNLEITH AND MINNESOTA PACKET CO.
v.
THE ROCK ISLAND RAILROAD BRIDGE.

To the honorable the circuit court of the United States for the northern district of Illinois:

The appeal of the above-named appellant respectfully showeth, that on or about the twenty-eighth day of January, in the year
47 one thousand eight hundred and sixty-three, the above-named libellant exhibited its libel in the district court of the United States for the northern district of Illinois against the appellees, praying, among other things, for the reasons set forth in said libel, that the appellee might be condemned to pay the demands of said libellant and costs in said libel mentioned, which libel was afterwards dismissed pro forma; that process issued out of said court, having been served on this appellee, the Rock Island Railroad bridge, it did, on or about the 15th day of March, in the year one thousand eight hundred and sixty-three, file an answer to the said libel in the said district court, praying that the said libel be dismissed with its costs in that behalf, as by reference to said libel and the said answer may more fully appear; that the said cause came on to be heard before the honorable Thomes Drummond, judge of the said district court, on or about the thirty-first day of December, A. D. 1864, upon the deposition and proofs taken in said cause, and the testimony and proofs adduced by the respective parties, and the said judge having advised thereon, on the twenty-fourth day of March, in the year 1864, made a decree or sentence in said cause, whereby it was,
48 among other things, sentenced and decreed that the libel in said cause be dismissed; and this appellant is advised and insists that the said decree is erroneous, inasmuch as the said libellant was entitled to its damages in the premises. And this appellant, for this and other reasons, appeals from the whole of the said decree to the next circuit court, to be held in the said district, (and on said appeal it intends to make new allegations in the circuit court and introduce the same, and new and further proofs;) and appellant prays that the record and proceedings may be returned to the said circuit court, and that the said decree may be reversed, or such other decree thereon be made as to said circuit court shall seem just, and that the

appellee may be condemned to pay to the appellant its costs and damages in the premises.

Galena, Dubuque & M. Packet Co.

ORRIN SMITH, *President.*

Endorsed: Filed March 31, 1864.

WM. H. BRADLEY, *Cl'k.*

And on the same day, to wit, the 31st day of March, A. D. 1864, said libellant, by its said proctors, came and filed in said clerk's office its appeal bond in said-entitled cause, which said bond is in the words and figures following, to wit:

49 *Appeal bond.*

Circuit court of the United States for the northern district of Illinois.
In admiralty.

Whereas an appeal has been taken to this court from the district court of the United States in the northern district of Illinois, in a certain cause wherein the Galena, Dubuque, Dunleith and Minnesota Packet Co. was libellant, against the Rock Island Railroad bridge, claimant, by the said libellant, and the said appellant has been ordered to give security, by the stipulation of itself and competent sureties, in the sum of five hundred dollars, for the payment of all damages and costs on the appeal in this court and in the Supreme Court: Now, therefore, the stipulators undersigned hereby stipulate in the said sum of five hundred dollars, to pay all damages and costs on the appeal in this court and in the Supreme Court, in case such appeal shall intervene.

Galena, D., D. and M. Packet Co., Orrin Smith, president.

ORRIN SMITH.
ROB. RAE.

Taken and acknowledged this 31st day of March, 1864, before me by R. Ray.

FRED. W. COLE, *U. S. Com.*

50 NORTHERN DISTRICT OF ILLINOIS, *ss:*

Robert Ray, party to the above stipulation, being duly sworn, deposes and says, that he resides in the northern district of Illinois, and is worth the sum of five hundred dollars over and above all his just debts and liabilities.

ROB. RAE.

Sworn to this 31st day of March, 1864, before me.

FRED. W. COLE, *U. S. Com.*

Approved. THOMAS DRUMMOND.

Endorsed: Filed Mar. 31, 1864.

WM. H. BRADLEY, *Cl'k.*

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, William H. Bradley, clerk of the district court of the United States for said northern district of Illinois, hereby certify the foregoing to be a true and complete transcript of the record of all the proceedings had in said district court, in the cause wherein the Galena, Dubuque, Dunleith and Minnesota Packet Company is libellant, and
51 the Rock Island Railroad Bridge Company is respondent, made up under the fifty-third rule in admiralty, as the same appears of record in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said district court, at Chicago, in said district, this fifteenth day of April, A. D. eighteen hundred and sixty-four, and of our independence the eighty-eighth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Endorsed: Filed April 18th, 1864.

WM. H. BRADLEY, *Cl'k.*

On this day, to wit, the twenty-sixth day of July, A. D. 1864, in the record of the proceedings of said court in said-entitled cause is the following entry, to wit:

THE GALENA, DUBUQUE, DUNLEITH AND MINnesota Packet Company
vs.
SO MUCH OF THE ROCK ISLAND RAILROAD bridge, &c., as lies within the northern district of Illinois. } Appeal.

52 Now come the parties, by their respective proctors, and thereupon this cause is set down for hearing upon the records and proofs filed herein, and the court, after hearing the arguments of the respective counsel, and not being sufficiently advised in the premises, takes time to consider.

On this day, to wit, the fourteenth day of December, A. D. 1864, in the record of the proceedings of said court in said-entitled cause is the following entry, to wit:

THE GALENA, DUBUQUE, DUNLEITH AND MINnesota Packet Company
vs.
SO MUCH OF THE ROCK ISLAND RAILROAD bridge, &c., as lies within the northern district of Illinois. } Appeal.

This cause having been heretofore, to wit, on the twenty-sixth day of July last, submitted upon argument, it is now considered and adjudged by the court, in conformity with the opinion of the circuit judge filed herein, that the decree of the district court be affirmed and the libel dismissed at the cost of the libellant, and that the respondents have and recover of the libellant and Robert Rae, his stip-
53 ulator, the costs and charges by him in this behalf expended,

and also its costs in the court below, amounting to the sum of dollars and cents, and that said respondent have execution therefor, and the libellant, by its proctors, gives notice of an appeal to the Supreme Court of the United States.

On this day, to wit, the twenty-second day of December, A. D. 1864, came the said libellant, by its proctors, and filed in said clerk's office, in said-entitled cause, its appeal and appeal bond, which said appeal and appeal bond are in the words and figures following, to wit: In the United States circuit court for the northern district of Illinois.

THE GALENA, DUBUQUE, DUNLEITH AND MINNESOTA Packet Company, appellant, *vs.* SO MUCH OF THE ROCK ISLAND RAILROAD bridge, &c., appellee; The Rock Island Railroad Company, the Mississippi and Missouri R. R. Co., claimants.	In admiralty.

To the honorable the Supreme Court of the United States:

The appeal of the Galena, Dubuque, Dunleith and Minnesota Packet Company, the above-named appellant, respectfully
54 showeth that on the twenty-eighth day of January, 1864, the above-named, the Galena, Dubuque, Dunleith and Minnesota Packet Company, filed its libel in the district court of the United States for the northern district of Illinois, against "So much of the Rock Island Railroad bridge, its tackle, apparel, furniture, piers, stones, railroads, tracks, flooring, appurtenances, and hereditaments, situate at Rock Island, in the State of Illinois, now in and upon and over the channel of the Mississippi river, as lies within the jurisdiction of the northern district of Illinois, in a cause of damage by collision, civil and maritime, for recovery of damages alleged to have been sustained by the said libellant to the steamers "Grey Eagle" and "Northern Light," and their cargoes, by collision with the said Rock Island Railroad bridge, on the Mississippi river, in the State of Illinois, and the said Rock Island Railroad bridge was arrested upon process issued upon said libel; and claim was filed by the Mississippi and Missouri Railroad Company, and the Rock Island Railroad Company, and one Azariah C. Flagg, trustee of the mortgages of said bridge, claiming the right to intervene for their several interests, but no stipulation was filed or offered to be filed by the said claimants, and your petitioner filed its exceptions as to their right to appear as
55 claimants, and their manner of appearing, which were overruled; and exceptions were taken to the ruling of the court; and such proceedings were had in the said cause that on the twenty-fourth day of March, 1864, a decree pro forma was pronounced therein by the said district court, wherein it was in substance adjudged that the said libel be dismissed; and that after such proceedings your petitioner duly appealed therefrom to the circuit court of the United States for the northern district of Illinois, and the said cause was removed thereby into the said circuit court and there tried anew, and such proceedings were had in the said circuit court that afterwards, on the fourteenth day of December, 1864, the said circuit court made

a final decree in the said cause, whereby it was in substance decreed that the said decree of the said district court be in all things affirmed with costs, which said decree of the said circuit court is, as this appellant is advised, erroneous and ought to be reversed; wherefore this appellant appeals from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the said decree of the said circuit court, and the libel, pleadings, evidence and proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the
56 said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree made condemning said appellee in damages and costs, or such other decree as to the said Supreme Court shall seem just.

ORRIN SMITH,
President of Galena, Dubuque, Dunleith and Minnesota Packet Co.
ROB'T RAE, *Proctor.*
A. W. ARRINGTON, *Advocate.*

Endorsed: Filed Dec. 22d, 1864.

WM. H. BRADLEY, *Cl'k.*

In the United States circuit court for the northern district of Illinois.

THE GALENA, DUBUQUE, DUNLEITH AND MINnesota Packet Co., appellant,
vs.
SO MUCH OF THE ROCK ISLAND R. ROAD bridge, &c., appellee;
The Rock Island Railroad Co. and the Mississippi and Missouri R. R. Co., claimants.
} In admiralty.

Know all men by these presents that we, Orrin Smith and Robert Rae, all of the city of Chicago, in the county of Cook, are held
57 and firmly bound unto the above-named Rock Island Railroad bridge, appellee, and the Rock Island Railroad Company and the Mississippi and Missouri Railroad Company, claimants, in the sum of five hundred dollars, to be paid to the said appellee and claimants, for the payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated the nineteenth day of December, in the year of our Lord one thousand eight hundred and sixty-four.

Whereas the above-named appellant has prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decree rendered in the above suit by the circuit court of the United States for the northern district of Illinois: now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute his appeal to effect, and answer all costs if he fail to make his appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ORRIN SMITH,
ROB'T RAE.

58 Sealed and delivered and taken and acknowledged this nineteenth day of December, A. D. 1864, before me.

ORRIN SMITH, JR., *Notary Public.*

UNITED STDTES OF AMERICA, *Northern District of Illinois, ss:*

Orrin Smith, jr., and Robert Rae, being duly sworn, deposed and say, and each for himself saith, that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

ORRIN SMITH.
ROB'T ROE.

Subscribed and sworn this nineteenth day of December, A. D. 1864, before me.

ORRIN SMITH, JR., *Notary Public.*

Endorsed: Filed December 22d, 1864.

WM. H. BRADLEY, *Cl'k.*

Approved. THOMAS DRUMMOND.

59 NORTHERN DISTRICT OF ILLINOIS, *sct:*

I, William H. Bradley, clerk of the circuit court of the United States for the northern district of Illinois, hereby certify the above and foregoing to be a true and complete transcript of the record of all the proceedings had in said court, in the cause in admiralty wherein The Galena, Dubuque, Dunlieth and Minnesota Packet Company is libellant, and the Rock Island R. R. Bridge Company is respondent, as the same appears of record in my custody.

In testimony whereof, I have hereto set my hand and affixed the seal of said circuit court, at my office in Chicago, in said district, this fourth day of January, A. D. eighteen hundred sixty-five, and of our independence the eighty-ninth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

60 In the United States circuit court for the northern district of Illinois.

THE GALENA, DUBUQUE, DUNLIETH AND MINNESOTA Packet Co., appellant; *vs.* SO MUCH OF THE ROCK ISLAND R. ROAD bridge, &c., appellee. The Rock Island Railroad Co. and the Mississippi and Missouri R. R. Co., claimants.	In admiralty.

By the honorable Thomas Drummond, one of the judges of the circuit court of the United States for the northern district of Illinois.

To the Rock Island Railroad Bridge Company, appellee, and the Rock Island Railroad Company, and the Mississippi and Missouri Railroad Company, claimants:

Whereas the Galena, Dubuque, Dunlieth and Minnesota Packet Company has lately appealed to the Supreme Court of the United

States from a decree lately rendered in the circuit court of the United States for the northern district of Illinois, in the eighth circuit, made in favor of you, the Rock Island Railroad bridge, The Rock Island Railroad Company, and the Mississippi and Missouri Railroad Company, and Azariah C. Flagg, trustee, against the said Galena, Dubuque, Dunlieth and Minnesota Packet Company, and has filed the security required by law, you are therefore cited to appear before the said Supreme Court, at the city of Washington, on the
61 first Monday of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of Chicago, in the northern district of Illinois, in the eighth circuit, the 22d day of December, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

THOMAS DRUMMOND.

I have, this 31st day of October, A. D. 1865, received a copy of the above citation. GEO. C. CAMPBELL,

Proctor for the Chicago and Rock Island Railroad Company, The Mississippi and Missouri Railroad Company, and Azariah C. Flagg.

In the Supreme Court of the United States.

THE GALENA, DUBUQUE, AND MINNESOTA PACKET CO.

vs.

THE RAILROAD BRIDGE, ITS TACKLE, APPAREL, &c.

DEFENDANTS' BRIEF.

The lible alleges that the vessels of the libellant were thrown upon the *turn-table pier* of the Bridge by reason of the improper obstruction in the Mississippi river, occasioned by the piers of said Bridge in the same and the Bridge itself over the same.

That said vessels were greatly damaged, &c., by the collision.

Therefore prays process *in rem* against the Bridge, its tackle, apparel, furniture, piers, stones, railroads, tracks, flooring, appurtenances, and hereditaments, and that the same be condemned and sold to pay the damages aforesaid.

The exceptions to the jurisdiction set out the Charter of the Bridge Company, granted by the Legislature of Illinois, as follows:

Bridge Charter.

An act to incorporate a Bridge Company therein named.

"*Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

"Section 1. That Joel A. Matteson, Joseph E. Sheffield, Norman B. Judd, and Henry Farnam, their associates, successors, heirs and assigns,

be, and are hereby, created a body corporate, by the name and style of 'The Railroad Bridge Company,' with power to build, maintain, and use a Railroad Bridge over the Mississippi river, or that portion within the jurisdiction of the State of Illinois at or near Rock Island, in such manner as shall not materially obstruct or interfere with the free navigation of said river, and to connect, by Railroad or otherwise, such Bridge with any Railroad either in the State of Illinois or Iowa terminating at or near said point, to unite and consolidate its franchises and property with any or all Bridge or Railroad Companies in either of said States; to fix the amount of capital stock; to divide, transfer, or increase the same; to borrow money, and pledge and mortgage its property and franchises; to condemn, according to law, property for the uses and purposes of said Company; to contract, bargain, and agree with any such Railroad Companies for aid in the construction and maintenance of said Bridge; to sell or lease said Bridge, or use of the same or the franchises of said Company, to any companies or corporations: Provided said Company shall commence said Bridge within two years, and shall complete the same within six years from and after the passage of this act.

"SECTION 2. This act to take effect and be in force from and after its passage.

"Approved *January* 17, 1853.

"J. A. MATTESON."

And also the acquired rights of the various claimants under contracts with the Bridge Company.

If it can be determined, in the first instance, whether the Bridge, its piers and superstructure and fixtures are personal or real property, the investigation of the points at issue in this case will be rendered easier. I shall therefore first consider that question.

By the common law "*real property* consisted of land and of all rights and profits arising from or annexed to it which are of a permanent and immovable nature. It is usually comprised under the words 'lands,' 'tenements,' and 'hereditaments.' Land means the whole sur-

face of the earth; tenement everything that may be holden, provided that it be of a permanent nature; and hereditaments comprised not only lands and tenements, but everything that can be inherited."

Cruise, Real Property, 2.

See also—

Washburn, Real Property, 2-9.
2 Bouvier's Institutes, 156 *et seq.*

And generally, a personal chattel becomes a fixture, so as to form a part of the real estate, where it is so affixed to the freehold as to be incapable of severance without injury thereto.

2 Rhode Island, 15.
1 Ohio State R., 511.
English *vs.* Foot, 8 S. & M., 444.
Pyle *vs.* Pennock, 2 Watts & Sgt., 390.
Voorhees, *vs.* Freeman, *Ib.*, 106.

The track, ties, and superstructures generally of a Railroad are real estate.

Mans *vs.* Logansport, &c., R. R. C., 27 Ills., 77.
Palmer. *vs.* Forbes, 23 Ills., 302.
Hunt *vs.* Bullock, 23 Ills., 320.
Titus *et al vs.* Mabee, 22 Ills., 257.
Farmers' Loan Co. *vs.* Henderson, 25 Bar., 484.
Beardsley *vs.* Ontario Bank, 31 Bar., 619.

And the franchises of a Railroad Company are real estate.

Pierce *vs.* Emory, 32 N. H., 484.
Willink *vs.* Morris Canal, 3 Green, ch. 377.
Seymour *vs.* Canandagua R. R., 25 Bar., 284.
Price *vs.* Price, 6 Dana, 107.

So that it may be laid down as a general rule that the term "real estate" includes all erections, structures, and buildings upon the land which are of a permanent nature, and intended to be used in connection with the same.

In Buckley *vs.* Buckley, (11 Bar., S. C. 43,) the rule is well stated, "That whatever is annexed or affixed to the freehold by being let into the soil or annexed to it, or to some erection upon it to be habitually

used there, particularly if for the purpose of enjoying the realty or some profit therefrom, *is a part of the freehold.*"

From the general rule in regard to fixtures, and the circumstances under which they are to be regarded as becoming a part of the realty, and the particular cases in regard to the Railroads and their superstructures above cited, where all of the ties, rails, bridges, and, in this State, even their rolling stock, are declared to be a part of the realty, I think there can be no doubt that this Bridge, its piers, stones, superstructure, and hereditaments, are essentially REAL PROPERTY, and I shall in considering this case treat it as such.

And I insist that a court of admiralty has no jurisdiction in this case—

First. Because of the locality of the tort.

Second. Because an action *in rem* cannot be maintained unless a *maritime lien* exists in favor of the libellants upon the property libelled.

Third. Because the Bridge is real property, and no *maritime lien* can exist upon it either in consequence of a tort or by reason of a contract.

Fourth. Because such a lien cannot be established by one single precedent in the whole range of admiralty jurisprudence, and is not in accordance with the reason or spirit of any rule whereby a lien is given.

I.

In cases of tort, jurisdiction depends upon the locality where the tort was committed.

1 Conkling's Adm'ty, 32, and notes.
The Eolides, 3 Haggard, 367.

And the locality must be in and upon the high seas or the navigable waters of the United States. (*Same authorities.*)

What of the *locality* in this case?

By the Bridge Charter the Company were authorized to encroach somewhat upon the navigable waters of the Mississippi, ("not materially obstructing the free navigation" thereof,) and artificially increase the area of the land to the extent of their structure; and this solely for the purpose of increasing the facilities of *land traffic*.

If the State had authority to grant this Charter (and that it had is clearly laid down in

The Wheeling Bridge Case, 13 How., 623.
People *vs.* Saratoga & Rens. R. R. Co., 15, Wend., 133.
M. & M. R. R. Co., *vs.* Ward, 2 Black, 485.)

then the structures erected under the Charter became an integral part of the land, and are *real estate* to all intents and purposes.

See authorities cited above.

This tort, if committed at all, was occasioned by means of and directly *upon* the land of the Company, their real estate, and not in and upon the navigable waters of the river.

I do not suppose it will be claimed that admiralty has jurisdiction of a tort committed upon an island, however small, or upon a barren rock, because it is surrounded by the sea or the navigable waters of a river.

The moment the dry land appears the jurisdiction of admiralty disappears.

The sole occupant of the smallest shoal of sand that lifts itself above the boundless ocean can say, "Thus far and no farther."

I confess I can see no distinction between an artificial island and a natural one, or between an artificial island and an artificial extension of the main body of the land.

Suppose a wharf or pier be constructed by competent authority and encroach upon the navigable waters of this lake or of the Mississippi river, and some ship or steamer being cast upon it and damaged, should file its libel *in rem*, would the Court entertain jurisdiction and issue its writ for the arrest of the wharf? I think not.

Suppose a steamer should be cast upon the artificial lands of the Illinois Central Railroad Company at the mouth of Chicago harbor, would the Court of Admiralty upon libel filed allow these lands and warehouses to be arrested because water once flowed over the spot?

In the city of New York the area of land has been extended for hundreds of acres out into the once navigable waters of the harbor. Should some shallop be stranded there would this Court by its warrant order the arrest of a whole ward of the city and entertain jurisdiction of the cause in admiralty because the locality is within the ancient ebb and flow of the tide?

Suppose a vessel or steamer, in running close to some warehouse, should get her masts or chimney foul of a hoist or crane connected with the warehouse, would that be a maritime tort for which a lien upon the warehouse would exist?

And yet if jurisdiction is entertained here, why not in either of the supposed cases? The very word arrest, as applied to the property mentioned in the writ, is a misapplication of terms.

You may arrest a thing in motion or capable of motion, but not property in its nature permanent and immovable as the earth on which it rests—as well talk of arresting a warehouse or a farm or a mountain.

II.

An action *in rem* cannot be maintained unless a *maritime lien* exists in favor of libellants upon the property libelled.

The authorities upon this point are uniform, and the 12th rule of Admiralty, as amended at the December Term, A. D. 1858, and which, in Maguire *vs.* Card, 21 Howard, 250 and 51, is held to be the proper limitation of the jurisdiction, declares—

That no lien not maritime will be enforced by an action *in rem*; and in the General Smith, 4 Wheaton, 438, Mr. Justice Story lays down the rule as follows: "No doubt is entertained by this Court that the admiralty possesses a jurisdiction in cases of material men, and if

this had been a suit *in personam*, there would not have been any hesitation in sustaining the jurisdiction of the District Court. When, however, the proceeding is *in rem*, to enforce a specific lien, it is incumbent upon those who seek the aid of the Court to establish the existence of such lien in the particular case."

In the propeller Commerce, 1 Black, 580, Mr. Justice Clifford says: "Process *in rem* is founded on a right in the thing, and the object of the process is to obtain the thing itself or a satisfaction out of it, for some claim resting on a real or a *quasi* proprietary right in it."

1 Black, 108, bags of linseed; Wills claimant. This was a case of a libel *in rem* for freight on 4,885 bags of linseed.

The claimant set up that though the freight was unpaid, yet the lien had been divested by delivery of the articles, and therefore action *in rem* would not lie. The District Court so held and dismissed the libel.

The Circuit Court affirmed the decision, and on appeal to the Supreme Court, Mr. Justice Taney says: "A shipper may enforce his lien for freight by proceeding *in rem*, and if it appears that the lien has not been waived by delivery his remedy *in rem* will be preserved." But in this case the Court held that lien had been waived and therefore action *in rem* would not lie.

1 Black, 525, steamer St. Lawrence, Meyer claimant, was a case where material men filed libel *in rem* for repairs.

It was admitted that a large amount was due, but claimed that there was no maritime lien for repairs, and so action *in rem* would not lie. And Mr. Justice Taney, in speaking of the 12th rule of Admiralty Practice, as amended, said: "This rule was altered at December Term, 1858, and process *in rem* denied to the party unless a lien was given by maritime law;" and also affirms the doctrine laid down in 4 Wheat., 438, "That where, upon the principles of the maritime code, a lien is given, the party is entitled to enforce it *in rem*, but where it is not given, he must seek his remedy against the person."

The Court, however, held that as a lien was given by the local law,

and suit was commenced while 12th rule of 184 was in force, the lien might be enforced *in rem*.

See also—

Bracket et al *vs.* Hercules, Gilkins R., 184.
Harper *vs.* New Brig, Gilkins R., 184.
Packet, 3 Mason, 255.
The Boston and Cargo, 1 Sumner, 328.
Bogart *vs.* John Jay, 17 How., 399.
1 Conkling's Adml'ty, 26, and notes.
1 Peters's Adml'ty, Dec., 223.

A maritime contract cannot be enforced by proceedings *in rem* unless a *lien* is annexed to it by maritime law.

Vanderwater *vs.* Yankee Blade.
1 McAll., C. C. R., (Cal.,) 9.

A ship-building contract is not maritime, and no lien under it can be enforced in admiralty.

Roach *vs.* Chapman, 22 How., 129.

All liens dependant on State laws, and not arising out of a maritime contract, are left to be enforced by State courts.

1 Maguire *vs.* Card, 21 How., 248.

Where maritime law gives the material man a lien, (as it does upon foreign vessels,) it may be enforced *in rem* before the vessel is launched, but to give the Admiralty Court jurisdiction it must appear by the libel that the vessel is of the size for maritime employment, and that her business was to be maritime navigation on the lakes or high seas.

The Charles Mears, 1 New'b. Adml'ty, 197.
And in the People's Ferry Company *vs.* Beers, 20 How., 393.

The whole scope and reasoning of the Court, as well as the Briefs of Counsel, recognize indisputably the doctrine I have laid down, and the Court held that the libel (*in rem*) was properly dismissed because the libellant had no lien by maritime law.

So also in Roach *vs.* Chapman, 22 Howard, 131, the same doctrine

was reaffirmed with emphasis, that a maritime lien is the sole foundation of an action *in rem* in admiralty.

And in New Jersey Steam Navigation Company *vs.* Merchant's Bank, 6 Howard, 436, in the opinion of Mr. Justice Woodbury upon this question of jurisdiction, I find the following:

"The jurisdiction is one thing and the form of proceeding another, and it is only when the vessel itself is pledged and no personal liability created, so as to lay the foundation for an action at law, that the form of proceeding seems too help to give jurisdiction in admiralty, where alone the libel *in rem* in such case can be followed. (Citing, 3 D. & E., 269.)

"But even then, I apprehend, the subject-matter must be proper for admiralty or it could not be prosecuted there *in rem*, because if the subject-matter be a carriage or a horse, rather than a ship or its voyage, or something maritime, admiralty would get no jurisdiction by the thing itself being pledged or to be proceeded against." (Citing the Fair American, 1 Pet. Adml'ty, 87; Duponciau on Jurisdiction, 22-23; Abbott on Shipping, 170.)

Where lien is lost other remedy than *in rem* must be sought.

The Hoffnung, 6 Rob., 385; (3 Eng. Adml'ty R.)
The Neptune, 3 Knapp, 112; (4 *Ib.*)
The Belvidere, 1 Dod., 356; (6 *Ib.*)
William Monny, 2 Hogg, 136; (7 *Ib.*)

III.

Maritime lien cannot exist upon real estate.

1. No precedent can be found where such a lien has been attempted to be enforced.

I have examined the authorities carefully, and have not been able to find such a case. Although the admiralty jurisdiction has at times been very widely extended, I cannot find that it has ever attempted to grasp the earth with its process.

2. The reason and necessity upon which maritime liens claim to be founded do not warrant a lien upon real estate.

The commerce of any State is carried on by the men and ships of the world, who have no domicil or property within reach of the process of the common law courts. They themselves and their property are as fleeting as the winds that propel them and the waters that float them, so that some extraordinary process was necessary in order to enable an injured party to obtain justice.

To the admiral of the fleet, who was supposed to be versed in all the laws of the sea, and who possessed the power necessary to enforce his orders, was intrusted, by common consent, the power to adjudicate in maritime matters, and as in many instances his ability to grant redress unless he first arrested the transitory property of the defendants would be lost, ships and appertenances were arrested in the first instance, and the claim investigated afterward and satisfied out of the arrested property unless otherwise paid.

And so liens originated, and have been gradually extended until now their name is legion.

And yet in every case where a lien has been held to exist it has been because the necessity for it existed.

Take an example: Material men have a lien for repairs, &c., on a foreign vessel, but not on a domestic one.

4 Wheat., 438.
1 Black, 580.
1 Black, 525.
1 Newberry Adml'ty, 197.

There is a lien by maritime law, because the foreign vessel may never again be within the jurisdiction of the Court, and the persons of her owners are not.

But in case of a domestic vessel, her owners can be subjected to an action *in personam* and in admiralty or in the common law courts, so the necessity of the lien does not exist.

Can the necessity exist for a lien upon real estate which is in its nature fixed and immovable when it does not exist in case of a domestic vessel?

And if no case of such a lien can be found it will not be held to exist. Maritime liens are *stricti juris*, and will not be extended by construction.

Vanderwater *vs.* Mills, 19 How., 82.

Courts of Admiralty cannot by rules create a new lien not provided by maritime law.

Ward *vs.* Chamberlain, 2 Black, 440.

And there is no maritime lien upon real estate. It is well settled that maritime liens were always confined to personal property.

A libel *in rem* can only be sustained where it is filed to enforce a maritime lien. If the subject matter is within the jurisdiction of the Court, a libel *in personam* may be sustained, but to sustain a libel *in rem* the subject matter must be one within the jurisdiction, and there must be a lien upon the *res.* to enforce which the libel is brought.

2 Blatch, 427.
1 McAll, C. C., 9.
21 How., 248.
Flanders on Shipping, 173.
3 Wm. Robinson, 220.
2 Black, 446.
Benedict's Adm'lty, pp. 111, 164, 165.
The Plymouth, 3 Wallace, 20.

A maritime lien is limited to goods and chattels, and never extended to lands, nor to the things possessed of the nature of realty.

IV.

There is no maritime lien upon a Bridge.

The same reasons urged above with regard to the non-existence of a maritime lien upon real estate apply here, even if it should be granted for the purposes of the argument that the Bridge is not real estate.

1. No precedent for such lien by maritime law.

2. No reason or necessity for the lien.

See especially the opinion of Mr. Justice Woodbury, 6 Howard, 436, above cited, and also 3 D. and E., 269.

The Fair American, 1 Pet. Adml'ty, 87.
Duponcian on Jurisdiction, 22-23.
Abbott on Shipping, 170.

Cases in which a *lien* exists by the maritime law so that an action *in rem* can be maintained.

Where Jettison is made of a part of cargo, the shipper has a lien upon the vessel, for that part of the vessel and freight are bound to contribute. This lien is a *maritime lien*, and may be enforced by a proceeding *in rem*.

Dupont De Nemours *vs.* Vance, 19 How., 168.

And generally the shipper has a right to resort to the vessel for injuries growing out of his contract of affreightment. The old maxim is that "'the ship is bound to the merchandise and the merchandise to the ship."

Ibid, 169.

See also—

18 How., 182.
The ship Packet, 3 Mason, 261.
The Volunteer, 1 Sum., 550.
The Reside, 2 Sum., 467.
The Rebecca, Ware, 188.
The Phœbe, Ware, 263.
The Waldo, Davis, 161.
The Gold Hunter, 1 Blatch. and How., 305.

The master may hypothecate both ship and cargo—

To obtain a ransom on capture;

To relieve vessel or cargo in distress;

and may even sell part of the cargo for these purposes, and when he does so the maritime law gives the shipper a lien on the vessel.

Ibid, 169 and 170, and cases there cited.

Salvors have by maritime law a lien upon the saved goods, and may enforce it by an action *in rem*.

Ibid. 171.

Material men have a lien upon foreign vessels which may be enforced

in admiralty *in rem* for necessaries and supplies, &c. (St. Jago De Cuba, 9 Wheat., 409.) And if the local law gives them a lien it may be enforced in admiralty.

Peyrony *vs.* Howard, 7 Pet., 324.

Claim for duties on goods cannot be enforced by a libel *in rem* in the admiralty.

The vessel is held liable for the acts of the master by the general maritime law.

Conkling's Adml'ty, 185.

Contracts of affreightment, charter parties, and bills of lading give the shipper under them a maritime lien upon the ship that may be enforced *in rem* unless expressly waived or divested by some subsequent act.

And conversely the owner of the vessel has a lien by maritime law upon the goods shipped for the unpaid freight. (Conkling's Admiralty, 188.) And in the cases of collisions the only lien recognized by the Rules of Admiralty is upon the offending ship. (See rule 15.)

And I believe no case can be found where an action *in rem* has been sustained or even brought against anything beside a ship or some of her appurtenances to obtain satisfaction for a tort.

I am aware that in Mann *vs.* Almeida, 10 Wheat., 473, the Court held that in action *in personam* appearance might be forced by an attachment of goods and chattels.

And that doctrine was sustained in Ward *vs.* Chamberlain, 2 Black, 430.

It was held that final process to satisfy decree might issue and become a lien upon real estate, but this was held to be under statute of, and not by maritime law.

None of these cases, however, come up to the one at bar, and I believe no further extension of the already broad jurisdiction of the admiralty will be countenanced by this Court, especially when the parties have

a full, complete and adequate remedy in common law where they can have the inestimable privilege of *trial* by *jury*; and in this connection I cannot forbear quoting from the very able opinion of Mr. Justice Johnson, in Ramsay *vs.* Alligree, 12 Wheat., 640:

"Every advance of the admiralty is a victory over the common law, a conquest gained over trial by jury. The principles upon which this suit could have been maintained are equally applicable to one half the commercial contracts between citizen and citizen. Once establish the rights here claimed, and it may bring back with it all the admiralty usurpations of the fifteenth century. In Egland there exists a controlling power, but here there is none. Congress has indeed given a power to issue prohibitions to a District Court when transcending the limits of its admiralty jurisdiction. But who is to issue a prohibition to us if we should ever be affected with a partiality for that jurisdiction? I therefore hold that we are under a peculiar obligation to retain the admiralty jurisdiction within its proper limits."

The Marshal must be able to take exclusive possession of the property libelled. This could always be done in cases of personal property to which maritime liens have always been limited, and this exclusive possession is essential to the jurisdiction of the Court.

Taylor *vs.* Carroll, p. 583.

If this lien, which is claimed, be sustained, there is a secret lien upon the Bridge, and there may be secret liens to an indefinite extent. Where there is a lien by law upon personal property, the possession of the property by the officer is notice to the world. When an attachment is levied on real estate there is a lien only from the filing of the certificate of levy, but here a secret lien on real estate is claimed which may be to almost any extent, and the existence of such liens would lead to endless collisions between the State and Federal Courts. (See the reasoning of the Court in the case last cited.)

B. C. COOK,

for Defendant.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 192.

The Galena, Dubuque, Dunlieth and Minnesota Packet Company,
Appellant.

vs.

So much of the Rock Island Railroad Bridge as lies within the Northern District of Illinois.

ARGUMENT FOR THE APPELLANT, BY A. W. ARRINGTON.

Beach & Barnard, Steam Printers, Nos. 122 & 124 So. Clark St.

IN THE

SUPREME COURT OF THE UNITED STATES.

No. 192.

The Galena, Dubuque, Dunlieth and Minnesota Packet Company,
Appellant.

vs.

So much of the Rock Island Railroad Bridge as lies within the Northern District of Illinois.

ARGUMENT FOR THE APPELLANT.

The libel in this case was filed against that part of the Rock Island Railroad Bridge which is situated in the Northern District of Illinois, for damage done by that part of the bridge to two steamboats, the property of the appellant, while engaged in navigating the Mississippi river. It is not necessary to give a more particular statement of the facts in this connection, because the libel is very brief as well as clear in its allegations. See Printed Record, pp. 2–5.

In accordance with the prayer of the libel, a writ was issued, and due service made; and subsequently, the Mississippi & Missouri Railroad Company, the Chicago &

Rock Island Railroad Company, and Azariah C. Flagg, intervened as claimants. Printed Record, p. 8.

Afterwards, the said claimants filed a single exception to the libel, the exception being in these words: "This honorable court has no jurisdiction to proceed against the property in said libel mentioned, in the manner in which the same is sought to be proceeded against by the libel. And therefore, the said claimants severally pray that the said libel may be dismissed with costs." Printed Record, p. 18.

On the exception being heard in the District Court, the Judge dimissed the libel, *pro forma*, and without giving any opinion upon the question involved. Printed Record, pp. 19, 20.

An appeal being then taken to the Circuit Court, the decree of the District Court, dismissing the libel, was sustained. Whereupon the case was appealed to this court of last resort. Printed Record, pp. 22, 23.

On the facts presented in the libel, two general questions arise. The first question relates to the jurisdiction of the court over the cause as one of admiralty cognizance; and the second, to the mode of proceeding *in rem*.

It is evident, however, that these two questions, though, in the present instance, closely connected, are legally very different in their character.

This distinction was stated with admirable clearness, in the case of the steamer St. Lawrence, 1 Black, 522, in which the demonstration is complete, that the jurisdiction is one thing, and the mode of exercising that jurisdiction an entirely different thing; and that this court, in all cases where the admiralty has jurisdiction at all, has full power to alter and change the modes of proceeding, whether *in personam* or *in rem*, at discretion.

I shall now proceed to discuss the two questions, previously indicated, the one relating to the jurisdiction, and the other to the process, or mode of proceeding, in the order of their enunciation.

First—The Jurisdiction.

It may be assumed, *in limine*, as an axiom, that the jurisdiction, the *jus dicendi*, the right of any court to speak in a given case, depends upon some fact appertaining to the case; and, consequently, that such fact is the criterion of the jurisdiction.

It is equally manifest, however, that the jurisdiction can only be inferred from the particular fact, by logical combination with a general principle serving as a major premise.

What then, is the general principle, what is the theoretical and practical rule, promulgated as the test of admiralty jurisdiction, in cases of tort?

And, here, all the books, both English and American, answer "locality."

"In torts, locality ascertains the jurisdiction."

2 Brown's Admiralty, &c., p. 110.

In England, the term "locality," as applied to admiralty law, means tide-water, and that too, beyond the limits of any county.

But in the United States, the same term merely means "navigable water." Hence, in our courts, the general test of admiralty jurisdiction, in cases of tort, is "navigable water."

The Genesee Chief, 12 Howard, p. 443;
The Magnolia, 20 Howard, pp. 301, 302.

Hence, in our courts, whenever the subject of admiralty jurisdiction is mooted, *place* becomes everything. The sole pertinent question is, WHERE? And if the answer is, that the tort in controversy was committed on "navigable water," all further inquiry is barred, and the jurisdiction must be pronounced demonstrably certain.

If there ever was any doubt as to this test, such doubt disappeared on the promulgation of the decision in the case of the Plymouth, 3 Wallace, p. 36, where Mr. Justice NELSON, delivering the opinion of the court, declared: "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."

But this was a tort commenced and consummated on "navigable water," and a tort against vessels protected by the admiralty law; and, therefore, unless logic is a sham and delusion, the case appertains to the admiralty jurisdiction.

The same conclusion results from another set of premises, or rather from another phase of the same premises, viewed in a different aspect.

"Admiralty jurisdiction comprehends all maritime contracts, torts, and injuries."

De Lovio v. *Boit*, 2 Gallison, p. 474.

But this was a maritime tort and injury.

And, therefore, the admiralty jurisdiction comprehends it.

But it is needless to spend more time in elaborating so plain a proposition; and especially, since it can hardly be supposed that the learned counsel on the other side will controvert an elementary principal of admiralty law.

Second. The Mode of Proceeding.

In cases of tort, objections have sometimes been urged against the process *in personam*. But no lawyer has intimated a doubt, no judge ever suggested a scruple, as to the legitimacy of the process *in rem*.

The right to proceed *in rem* has been recognized in numberless cases.

"The vessel doing the injury is liable *in rem* for the tort."

Waring v. *Clarke*, 5 Howard, 467.

Such is the universal formula of the maritime law.

But what makes the offending vessel liable? What is the essential fact from which the the *jus in re* arises?

Analyze the elements of the case.

1. The offending ship is not liable, for the reason that she herself is the subject of admiralty jurisdiction. She may be engaged exclusively in inter-state commerce. She may be of less than ten tons burthen. Nay, the culprit may have no higher maritime *status* than that of a mere flatboat. And yet the process *in rem* will go.

20 Howard, 305.

2. The vessel is not liable from the character of the motive power, whether air or fire.

3. Nor is it liable because in motion. It may be floating like a log on the water. It may be riding at anchor, without a ripple to break the water line on its painted planks. But if it commits a mere negative injury, by being in an improper place; on the wrong side of a river; or too near the mid-channel, the admiralty holds it responsible for the damage.

4. You can find but one circumstance which renders the vessel liable. It has done an injury in a maritime locality.

But the present case, too, is one of collision—the collision of a vessel with a mass of wood and stone, an artificial structure erected in the bed of a navigable river.

The two cases are identical as to that element which alone constitutes the foundation of the liability *in rem*. The offending ship, in an ordinary collision case, and the offending bridge, in this, have both committed an injury in a locality within the admiralty jurisdiction.

And here we have our first demonstration under the second head.

1. *Ubi eadem ratio ibi idem jus.* In cases presenting the same reason, the same rule of law applies.

2. But the same reason for a liability *in rem* exists in the case of an offending bridge as in that of an offending ship.

3. Therefore, the same law exists.

There is, however, another reason, not one derived from a particular fact, and therefore arbitrary, but one resulting from considerations of the widest policy, and therefore the offspring of natural justice,—why there should be process *in rem* in the case of the ship; and that is the necessity of cutting off anterior liens. Hence, the *jus in re*, based upon a maritime injury, overrides every other claim, even the most favored in law. Ownership, the interest of mortgagees, bottomry, respondentia, the lien for sailors' wages—it extinguishes them all.

But the same reason of enlightened and humane public policy, only a thousand times stronger, is apparent in the case of this bridge. It stands before the court papered all

over with liens and leases, mortgaged at the rate of a hundred dollars for every stone. What fruition could we hope for by a suit *in personam*, even if the Bridge Company were a real *corpus* susceptible of a summons, and not, as it truly is, a mythic creature of the fancy, more ideal than the sylph of sunbeams?

And, therefore again, the proceeding *in rem* is justified by the reason of the law.

Let me now quote from a high authority, and the very passage which was cited by Justice Clifford, as the chief premise of his opinion in the case of the propeller Commerce, 1 Black, 579.

1. "A trespass upon person or property committed on "waters within the admiralty jurisdiction, is a case belonging to that jurisdiction; and the courts of the United "States may proceed therein either *in personam* or *in rem*.

1 Curtis' Comment., p. 50.

2. But this is the very case specified in the preceding definition.

3. Therefore, the process may be either *in personam* or *in rem*.

One of the authorities cited by Curtis in support of his text, is *Manro* v. *Almeida*, which is directly on the point.

In the latter case, Hoffman & Mayer, for the appellant, deduced the power to attach property in order to compel an appearance, from the fact "That courts of admiralty "act *habitually in rem*."

10 Wheaton, 475.

Taney, for the appellee, urged that the process was erroneous, because virtually *in personam*.

10 Wheaton, 484.

The court said: "The ground of complaint is a mari-
" time tort, the violent seizure on the ocean of a sum of
" money, the property of the libellant. That the libel-
" lant would have been entitled to admiralty process,
" against the property, had it been brought within the
" reach of our process, no one has questioned. The only
" doubt on this part of the subject is, whether the remedy
" *in personam* can be pursued in the admiralty."

10 Wheaton, 486.

Here, in the case of a marine tort, it was declared that process *in rem* might run against specie dollars, the least maritime of all imaginable things. And in the same volume we find the same process against sixty pipes of brandy.

How, then, will you deny the process in the case of stones, wood and iron? Can the human mind conceive a distinction which shall include the one case, and exclude the other?

Instances of the proceeding *in rem* against logs of mahogany, bales of silk, bags of coffee, and nearly every article of merchandise, are thickly strewn over the reports.

If it be objected that these were cases of *maritime* contracts, the answer is overwhelming—this is a case of *maritime* tort. And both the right and the remedy are as plenary and perfect in the one case as in the other.

The shipowner who carried the wood, stone and iron on its ill-omened transit to the destiny of creating this nuisance, might certainly have libelled those materials for his freight. But now, that they have been constructed into a dangerous impediment to navigation, will you say that they can not be libelled for an injury done to a ship?

SECOND DEMONSTRATION.

1. "It is proper to prosecute for marine torts *in per-* "*sonam* as well as *in rem*."

New Jer. St. Nav. Co. v. *Merchants' Bank*, 6 Howard, 436.

2. But this is a marine tort.

3. *Ergo.* The prosecution may be *in rem*.

Can any one deny this to be a marine tort?

Hear, then, a JUDICIAL DEFINITION OF THE TERM, resulting in a THIRD DEMONSTRATION.

1. "Torts, in reference to admiralty jurisdiction, in- "clude wrongs suffered from the negligence or malfeasance "of others, where the remedy at common law is by an ac- "tion on the case."

Case of the Piles, 23 Howard, 215, 216.

2. But this is the very case defined, the same in all its elements. It is a wrong suffered from the negligence or malfeasance of others; and the remedy at common law would be by an action on the case.

3. *Ergo.* Unless logic be all a cheat and fallacy, more hypothetical even than the being of the Bridge Company, this is a marine tort.

Now, hear a JUDICIAL DEFINITION OF THE PROCESS, resulting in a FOURTH DEMONSTRATION.

1. "Marine torts may be prosecuted *in personam* in "any district where the offending party resides, or *in rem*

" wherever the offending thing is found to be within the " jurisdiction of the court issuing the process."

The Propeller Commerce, 1 Black, 580.

2. But this is a marine tort according to the first definition.

Therefore, according to the second definition, it may be prosecuted *in rem*.

Can any ingenuity evade this reasoning?

Therefore, nothing remains but to concede this to be a marine tort; and conceding that, you cannot refuse process *in rem*.

No illustration can increase the force of the argument. As well might one hope, by exclamation points, to render more convincing a truth in geometry.

But *audi alteram partem*. What is to be said on the other side?

Let us consider the objections in the order of their enunciation on the oral argument, in the court below.

First Objection. " Maritime liens are *stricti juris*, and " not to be extended by analogy."

Answer:

I. The formula can not be applied literally. Otherwise, a maritime lien could never have been extended from sail vessels to steamers. Nor could it be extended to the case of any new motive power in the future.

II. We claim no extension here, by analogy. All the cases of maritime tort are identical in principle. Wherever a maritime tort has been perpetrated through the instrumentality of an offending thing, such thing is liable *in rem*

for the injury. Not an exception to this rule can be found in the books. Nor was there ever even a *dictum* to the contrary from any bench in England or America.

III. Process *in rem*, in cases of tort, is not predicated on the idea of a maritime lien.

In the case of the Volant, 1 W. Rob, 387, Dr. LUSHINGTON says: "The Court of Admiralty has jurisdiction "over the whole subject-matter of damage on the high "seas, and the arrest of a vessel is only one mode of pro "ceeding. THE DAMAGE CONFERS NO LIEN upon the ship, but "an arrest offers the greatest security for obtaining sub- "stantial justice in furnishing a security for prompt and "immediate payment."

Second Objection. "The bridge, by attachment to the "bed of the river, is real estate; and admiralty has no "sort of jurisdiction in a matter connected with real es- "tate."

Answer:

I. As the pleadings now stand, the bridge is admitted to be a nuisance. Hence, if it is to be deemed, in a technical sense, real estate, it has become so wrongfully. And therefore, it can derive no kind of privilege or exemption from its new character so wickedly assumed. Its ostensible owners can gain no species of advantage or benefit from their own wrong.

Nullus commodum capere potest de injuria sua propria.

The maxim is one of universal law, at least as ancient as Ulpian, who thus words it: *Nemo ex suo delicto meliorem suam conditionem facere potest.*

What! shall the sinner plead his own crime to shield

him from a merited punishment? Shall any man be permitted to say to a court of admiralty—"I have ousted you "of jurisdiction by the very enormity of my offence?"

In the light of legal reason, the case is simply this. So far as the owners are concerned, the bridge is not property at all, or of any description. It is a nuisance, and as such liable to abatement by any one *proprio motu*. But so far as those who have suffered by it are concerned, it is an "offending thing," and therefore amenable to process *in rem*, for the purpose of making compensation.

II. *Reductio ad absurdum*. If the bottom of the Mississippi is real estate, so is the water. For *cujus est solum ejus est usque ad cœlum*. Real estate includes the water upon it as well as the minerals within it.

3 Kent's Comm., 401.
Coke upon Litt., 4, *a*.

Therefore, if the adverse hypothesis be true; if the bed of the Mississippi be real estate, and if the fact of a connection with real estate, *per se*, excludes the admiralty jurisdiction, then the whole river is out of the jurisdiction! And the same is true of all other rivers, especially where the common law rule prevails!

But the Supreme Court has decided the Mississippi, and all other navigable rivers, to be within the admiralty jurisdiction.

Ergo. The adverse hypothesis is not true.

The tenacity of life in the race of absurdities is truly wonderful. Thus, the theory that admiralty becomes mute and powerless in the presence of real estate, is but a corollary from the ridiculous old English rule, that admiralty has no jurisdiction within the body of a county. Because,

according to the English law, everything attached to the soil within the body of a county, was real estate; and nothing was real estate beyond the body of a county. And, hence, as admiralty had no voice *infra corpus comitatus*, the mere fact of a connection with real estate became a negative criterion of jurisdiction.

But this criterion was exploded on the very instant when the Supreme Court declared the nullity of the rule of *infra corpus comitatus*. Since then, the ships may be floating over real estate, may be anchored to real estate, may be resting on real estate; and yet the admiralty has full jurisdiction.

Nevertheless, although the parent absurdity is dead, the corollary, its legitimate child, still lives to shock common sense. Any lawyer would be ashamed to say, "Admiralty "can not enter the body of a county;" while many will not blush to avow the cognate folly, "Admiralty can not "touch a thing attached to real estate." They admit the falsity of the premise, but stoutly maintain a conclusion which has no other ground of support.

III. *Instantia crucis.* According to the adverse hypothesis, the piles in 23 Howard were real estate. They were attached to the bed of the river—driven in so deeply as to render their removal extremely difficult. Therefore, the common law maxim applied *quicquid plantatur solo, solo cedit.* Hence, the piles, by attachment to the earth, became real estate.

Therefore, *ex hypothesi*, the admiralty could have no jurisdiction.

But the Supreme Court affirmed the jurisdiction in that very case.

Ergo. The hypothesis is purely fictitious.

The case in 23 Howard is decisive of this. The piles were the relics of an abandoned bridge. They were real estate if this bridge is real estate. They were a dangerous nuisance, as this bridge is a nuisance. They had injured a vessel protected by the admiralty law, in the same way, though not to the same extent, as our vessels were injured in the present instance. How, then, can you discard the jurisdiction? If the Supreme Court took admiralty cognizance of a case where the mere abortion of a bridge had been the occasion of damage, how can you refuse to take cognizance in the case of the completed bridge, the full-grown giant, that has already dealt death to a hundred ships?

IV. If the adverse hypothesis be true, a ship would cease to be within the admiralty jurisdiction, by merely attaching it to the bottom of a navigable river. Because, *ex hypothesi*, it would thereby become real estate. But will any lawyer or judge affirm this to be so? Can any addition to a wrong render it a right, or procure it an advantage? The ship is liable *in rem* for an injury done while floating in an improper place in navigable water. Well, you station her in that place. You affix her to the soil in the center of the channel. She ceases to be a ship. She is converted into real estate. And now, will you say, *ipse facto*, she is out of the admiralty jurisdiction, although but an instant before the process of affixion was consummated, she remained within the jurisdiction? What a strange jurisdiction that must be, which can be torn asunder by the teeth of a saw, or frightened away by the blows of a hammer!

V. The principal thing here is the injury done to a vessel, in a maritime locality; and the fact that the offend-

ing thing is connected with real estate, is only an incident. The case, therefore, falls within the rule stated by Blackstone, 3 Comm., 108:

"Where the admiral's court hath no original jurisdiction "of the cause, though there should arise in it a question "that is proper for the cognizance of that court, yet that "doth not alter or take away the jurisdiction of the com- "mon law. And so, *vice versa*, if it hath jurisdiction of "the original, it hath also jurisdiction of all consequential "questions, though properly determinable at common "law. Wherefore, among other reasons, a suit for bea- "conage of a beacon standing on a rock of the sea, may "be brought in the court of admiralty, the admiral having "an original jurisdiction over beacons."

One of the cases cited by Blackstone in support of the text, is 1 Siderfin, 158; and there, the objection was urged and expressly overruled, that the rock on which the beacon stood belonged to the inheritance.

All the authorities agree with Blackstone.

1 Kent's Comm., 378.
2 Saunders' Rep., 259, *e*.
2 Lev., 25.
Cr. Eliz., 685.
6 Viner's Abridg., 516.

But our case is a manifest instance of the rule laid down by Blackstone.

There the admiral had original jurisdiction over beacons; and therefore he was adjudged to have jurisdiction in the case of a rock, which was real estate, because it was used as a beacon.

But here, the admiralty has undoubted jurisdiction over torts committed by means of wrongful impediments in navigable waters.

And therefore, the admiralty has jurisdiction, although the impediment may be affixed to real estate.

Can you hesitate to apply a principle, which even the jealous and narrow-minded courts of the common law in England did not scruple to concede against themselves? *Fas est et ab hoste doceri.*

Third Objection. "It is absurd to libel a bridge."

Answer:

I. The only absurdity in the case is its novelty. And whether that is to be deemed an absurdity, or not, depends very much upon the mental constitution of individuals. Everything new is absurd to those who deny that the earth moves.

II. The true rule, on the subject of novelty, was enunciated in an axiomatic form by ASHURST, Justice, in *Pasley* v. *Freeman*, 3 T. R., 63.

"Where cases are new in their *principle*, it is necessary "to have recourse to legislative interposition in order to "remedy the grievance. But where the case is only new "in the *instance*, it will be just as competent for courts of "justice to apply recognized principles to any new case "that may arise two centuries hence as it was two centu- "ries ago. If it were not so, we ought to blot out of our "law books one-fourth part of the cases that are to "be found in them."

But we have the principle here; as old as the admiralty; as old as the common law: "That the admiralty courts "have jurisdiction over all torts committed in a maritime "locality." And the present case is only a *new instance* under the universal principle.

Fourth Objection. "The term bridge, *ex vi termini*, "means a structure attached to the shore."

Answer:

It would be a miraculous bridge, certainly, which could revolve on a turn-table, in the middle of a river, and yet remain permanently attached to the shore!

Fifth Objection. "There can be no maritime lien in the "case, because the bridge is a nuisance. It is extraordinary "to ask the court for process to sell a nuisance."

Answer:

I. The lips of the owners can not be permitted to allege their own work to be a nuisance, for the purpose of eluding the consequences of their own wrong. Such a plea is without a parallel. What do they say? Their reasoning runs thus:

"If we had left the structure floating in the water, so "that it might have been moved aside by the winds, or "carried away by the floods, you might hold the offending "thing liable *in rem.* But we have fixed it in the center "of the stream. We have made it an everlasting obstruc-"tion that neither wind nor wave can displace. *Ergo*, "you can have no jurisdiction over it by process *in rem.*"

It is as if the thief should exclaim, "You can not arrest "me. The very magnitude of my felony has purged the "offence!"

II. The bridge has a double character. In the view of a court of law or chancery, it may be a nuisance, and therefore the subject of indictment or abatement. But admiralty knows nothing of nuisances, *as such.* It merely

considers the nuisance as a thing offending against its appropriate urisdiction, and therefore holds the offending party responsible *in personam*, and the offending thing liable *in rem*, to the extent of the injury done.

Sixth Objection. "That the bridge cannot be arrested; "because it is *immovable*."

Answer:

This sounds very like a pun founded on the literal import of the word "arrest." However, I am aware of nothing on the earth that is immovable by sufficient time and toil. And if the court will decree this bridge to be sold, we will find a purchaser to try the experiment, and see if it be fixed forever as the poles of the heavens.

We now arrive at a new phase in the evolution of the adverse arguments. Henceforth, we have to deal with objections as ingenious as they are technical. Henceforth, our appropriate motto must be,—

Ex illo Corydon, Corydon est tempore nobis.

Seventh Objection. "In the case of process *in rem*, the marshal must have exclusive possession of the property attached. But that cannot be so here. Therefore, in this case, there can be no process *in rem*."

This argument makes two false assumptions; one of law, and the other of fact.

I. To support the assumption of law, the case of *Taylor* v. *Carryl*, 20 Howard, p. 583, is cited, in which Justice CAMPBELL said: "To give jurisdiction *in rem*, there must have been a valid seizure, and an actual control of the ship, by the marshal of the court."

But it is plain, that this language must be construed in connection with the actual circumstances of the case then before the court. What were the facts? A vessel had been seized, under process of foreign attachment, issuing out of a State court; and afterwards, the marshal attempted to arrest the same vessel by virtue of Federal process, issued on the filing of a libel for mariners' wages; but the sheriff refused to surrender possession. And under these circumstances, the court held the attempted arrest by the marshal to be invalid; because the vessel was already in the custody of the law. The main reason of the opinion, however, was predicated on the necessity of avoiding a conflict of jurisdiction between the State and Federal judiciary; and even from this decision, four judges dissented.

The result of all the authorities is, that in the case of process *in rem*, the thing arrested remains in the custody of the law, or rather, of the court, of which the marshal is merely the agent; and if the marshal neglects his duty by not keeping the thing under his control, the only consequence is that he loses his fees; while, if any other person gets possession, the court can compel such person to re-deliver the thing by attachment, or other summary process.

The three preceding propositions have been distinctly ruled in the following cases:

Jennings v. *Carson*, 4 Cranch, p. 24;
The Hibernia, Sprague, p. 78;
The Phebe, Ware, p. 62.

II. The assumption of fact implied in the objection is equally groundless. The bridge is now in the custody of the law, by the attachment and ministerial control of the marshal.

The marshal's return is in these words:—"Executed this "writ by attaching so much of the Rock Island Railroad "Bridge and fixtures as lies in my district."

Printed Record, p. 8.

Where, then, is the proof that the bridge is not still in the marshal's custody?

Eighth Objection. "If the court should order the bridge "to be sold, there must be a judicial power to give the "purchaser possession. But a court of admiralty has no "power to issue a writ of possession. Therefore, the bridge "cannot be sold."

Answer:

I. The assumption is not true, that courts of admiralty cannot issue writs of possession or assistance. These courts have the power to order the sale of real estate when covered by the lien of their decrees. And therefore, they must possess the essential element of judicial power, to render their orders and decrees effectual.

Ward v. *Chamberlain*, 2 Black, p. 430.

In this last case, it was explicitly decided that the courts of admiralty are authorized to issue writs of execution, even in the case of real estate; and "that the proceedings "thereupon shall be the same as those used in the courts" of the particular State.

2 Black, 442.

The objection of the learned counsel has been overruled in advance by the highest authority.

II. We have no need of any assistance from this court to get possession of the bridge when sold. The decrees of

the admiralty *in rem* operate on the *status* of the thing, and are binding upon the whole world. If, therefore, we obtain the right of property in the bridge by virtue of such a decree, and the consequent sale, we have no sort of apprehensions that any one will dispute our right of possession in the case. And we think, too, that our damages will not fail to be paid by somebody, before the bridge is brought under the hammer. But all this, we respectfully submit, is our business; and we are willing to take the chances.

Besides, the conclusive return of the marshal shows him to be in possession of the bridge; and hence, there will be nothing for him to do but to turn over his possession to the purchaser.

Ninth Objection. "That the privilege of using the "bridge is a franchise which can only be conferred by "grant from the State. *Ergo*, that the purchaser under a "decree of this court could take no benefit from the sale, "because he would not, by that, be enabled to enjoy the "franchise."

Answer:

I. There can be no franchise in a nuisance. The grant from the State authorized the building and use of such a bridge as should not obstruct navigation. But, as the fact stands admitted on the record, this bridge does obstruct navigation. Hence, it is not the bridge authorized by the legislature. And hence, also, there is no franchise in the case.

II. Our process is against the materials of the bridge, and not against the franchise. We believe that we can make our money out of the materials; and if we fail, it is no concern of the adversary.

Tenth Objection. "The libel is against part of the bridge "only. And if that be taken away, it will necessarily "destroy the value of the remainder. But the courts of "the country do not sit, to destroy men's property with- "out a hearing."

Answer:

I. Substantially the same objection was urged in the case of *Miss. & Mo. R. R. Co.* v. *Ward.* And the Supreme Court conceded it to be "difficult to decree in any "case of material obstruction, unless the whole nuisance "is in the power of the court."

2 Black, 495.

The judgment of the court, however, was only upon the point, that, as the proofs tended to show the alleged nuisance to be situated on the Illinois side of the river, and as the bill was brought in the district of Iowa, the jurisdiction of which did not extend to the Illinois side, the suit must be dismissed.

Now, it is perfectly obvious, that the difficulty suggested by Justice CATRON, in the case cited, does not exist in the present instance. This is a proceeding *in rem* to which all the world may be considered virtual parties; and every person having the slightest interest, has an opportunity to be heard. The real owners of both halves of the bridge are in court, and have already been heard by their counsel. It is their objection which I am now answering.

The proceeding *in rem*, therefore, gets rid of all difficulties, by the very nature of its process; and since it is the only proceeding that does so, it ought to be encouraged to the utmost limit of judicial policy.

II. It does not follow from any known principle of

human nature, that the purchaser under a decree against the Illinois nuisance will remove it, or refuse to permit the owners of the Iowa half to use it, for a consideration. The presumption is altogether the other way. And if we may be allowed to predict what every one knows must turn out to be the future fact, we are entitled to say that there is no moral possibility of the bridge being ever put up to sale, for the reason that the wrongdoers have the power to hinder it by a just and prompt payment of the decree; and their interest will compel them to do so. This, I admit, is not a theoretical, but a practical, argument, and one that deserves the most serious attention.

Thus, the proceeding *in rem* harmonizes all claims with the eternal dictates of natural justice. It hears all parties. It pays the damage of all sufferers. And yet it allows the bridge to stand for the benefit of the owners, and for the accommodation of the public, upon the single condition that those who reap its profits, shall make good the losses it occasions.

In fact, all the parties in interest, as to the whole bridge, are now before the court as claimants.

III. The bridge on the Iowa side, may be no nuisance. But are not the owners on that side equal offenders by their voluntary connection with the proprietors of the Illinois nuisance? It is something revolting to human reason, and monstrous to the judicial conscience, to say, "you shall not "touch this undoubted and dangerous nuisance, because "it is attached by cement, by wood, and by iron, to another "thing which is not a nuisance!" Can it be true, that two men may erect a nuisance anywhere on the dividing line between States, in the Mississippi river, and through the sham formality of a separate ownership of the ideal

halves, bid a bold defiance to every tribunal of the land!

Upon the hearing of proofs, it will appear that the Iowa part of the bridge is either a nuisance or it is not. But if it be found to be a nuisance, surely no one will affirm that one nuisance can afford protection to another. And if it is determined not to be a nuisance *per se*, yet no judge can deny it to be a *particeps criminis*. It gives aid and comfort to its guilty brother; and it pockets some of the profits of trespass and murder. Besides, shall the innocent man thrust himself between the sword of the executioner and the condemned felon, with the foolish or the criminal cry, "you must not strike him, because the blow will crush me "also?"

Suppose the Iowa part of the bridge not to be a nuisance, yet the Illinois part, by confession, is; and therefore, it stands like Shakspeare's "mildew'd ear blasting his whole- "some brother;" nor can the Iowa part hope to escape the vile contagion.

Eleventh Objection. "If the court should allow this "proceeding, it will be necessary, as an incident of the "decree, to determine the priority of various liens relating "to real estate."

We have already virtually answered this objection, by showing that whenever courts of admiralty have jurisdiction over the principal subject matter of a case, they have, at the same time, the most ample power to adjudicate any sort of incidental questions, growing out of that, although appertaining to real estate, and not originally within their jurisdiction. Indeed, this is a power which belongs to every tribunal, even the humblest.

Twelfth Objection. "The principle of this case would "justify the extension of the jurisdiction to the case of a "wharf on the bank of a navigable river."

I deny the inference. Because all wharves, ever yet known, are mere fixtures of the shore; while this bridge is a fixture to the main channel of the stream.

But if you build a wharf in the middle of the Mississippi, so as to materially obstruct navigation, and a vessel suffers injury from it, then, I agree, that the admiralty process *in rem* may go against the offending thing. Why not?

Thus ends the catechism of objections, and I will now close with two final suggestions, *ex minore.*

First. You can libel a ship, or a flatboat, or a raft of valuable logs, floating in the Mississippi, for a single injury, produced by the negligence or malfeasance of the owner.

Then why, in the name of reason and justice, can you not libel this organized, intentional, everlasting nuisance, that has covered the river with the fragments of shipwreck, and polluted its waves with the blood of innocent passengers? Can you find any line of law; or any authority short of the barbarous ages, which denies your power to give us this beneficent and most effectual process? If you turn us away from the Federal forum, you leave us without the hope or possibility of a remedy. And you say to the destroyer of ships and men, "You have triumphed. "You are as free from the fear or force of the law, as the "tempest or the pestilence!"

But we will trust for a different result.

Second. You can libel an offending ship, whether she did an injury while riding at anchor, or resting on the

bottom of the river, in the exact place where the bridge now stands.

Then why can you not libel this maritime monster, located there, and armed with its two piers, as the dilemma of a double death? How comes it, that this unnatural coalition of Scylla and Charybdis alone has the prerogative to defy your authority, and resist your process? The libel alleges, and there are in existence the clearest proofs to show, that it is next to an impossibility to avoid one of these piers without being dashed upon the other. Thus the old hexameter is literally true of this nuisance:

Incidit in Scyllam cupiens vitare Charybdim.

And the comparison holds in more respects than one. For, as Homer tells us, Scylla presented six heads, and every head snatched a man from the passing ship. And six lives made the precise number lost in one of the collisions detailed in our libel.

And shall it be said, that the admiralty is impotent to redress such wrongs, committed here, on the greatest maritime highway which providence has prepared for the travel of its children, on the surface of the globe—here, in the fairest province of the jurisdiction, and in the main artery of the hemisphere? We respectfully submit, that the bare thought carries us back, at least, three centuries into the by-gone intellectual night of time, and is in fact a libel upon the present fame and glory of an enlightened admiralty law.

Nevertheless, to confess the truth, although our case in respect to principle is among the clearest ever presented to a court of justice, we have some fears of the result. For we are aware that the first hasty impression of the bar will be against us; and many will exclaim, "who ever "heard of a libel in the admiralty against a bridge?" *Prima facie*, the novelty of the case is against it.

But we beg the court to remember that, if we can account for the novelty, then it, too, is converted into an argument in our favor, in accordance with the maxim, *exceptio probat regulam*. And there are several considerations to explain the novelty.

I. In England, no such case could possibly arise; because, there, the admiralty jurisdiction did not extend above the first bridges from the sea.

II. In America, until a very recent period, the jurisdiction was limited by tide-water; and bridges are rarely, if ever, built over that.

III. Bridges are usually constructed by scientific engineers, and in such a manner as not to render them nuisances. This is, we believe, the very first instance where the piers of a bridge were laid at an angle with the current, as if set on purpose for the destruction of vessels.

IV. This is the first bridge ever erected across the Mississippi; and *it* has been libelled; and the libel stands justified by all the principles and definitions of admiralty law, as well as by the dictates of an imperative public policy, and the high sanctions of humanity and justice. While, on the other side, there is nothing, absolutely nothing, but the cry of "novelty," and the clamors of a corporation, with more greed for gain than regard for either the property or the lives of their fellow-men.

ADDENDUM.

As the sole difficulty in the case relates to the mode of proceeding *in rem*, I earnestly, but respectfully invoke the attention of the court to the following brief considerations.

I. The case is one of unquestionable admiralty jurisdiction.

II. Where the case is one within the admiralty jurisdiction, this court has the undoubted power to prescribe the mode of proceeding, whether *in rem* or *in personam*.
The steamer St. Lawrence, 1 Blak, p. 522.

III. This court has prescribed no mode of proceeding, has enunciated no rule, in the case of damage done to ships or steamboats by bridges.

From these undeniable propositions, I submit, that the subsequent ones are logical corollaries.

IV. In the absence of authoritative rules, a party must be entitled to adopt the old and established mode of process *in rem*.

V. If the analogy of the published rules is to be the guide, then the fifteenth rule must govern; because this case is more nearly assimilated to cases of collision than to any others for which rules have been prescribed. Therefore, the libellant can sue out process either *in rem* or *in personam*, at his option.

VI. The novelty is no greater, in this case, of a proceeding *in rem*, than would be that of a proceeding *in personam*: since there is not a single instance in the books of *process* in either form for injuries to vessels by bridges.

FINALLY. If all the rest of my argument were stricken out as null, the six preceding propositions would still be a demonstration as to the propriety of the proceeding *in rem*. There is no rule against it. There is no case against it. There is no analogy in the rules against it. All analogies are in its favor. There is no inconvenience in it. And no possible injury can result from it.

All of which is respectfully submitted.

A. W. ARRINGTON.

SUPREME COURT, UNITED STATES.

No. 192.

THE GALENA, DUBUQUE, DUNLEITH AND MINNESOTA PACKET CO

vs.

SO MUCH OF THE ROCK ISLAND R. R. BRIDGE AS LIES WITHI
THE NORTHERN DISTRICT OF ILLINOIS.

BRIEF FOR APPELLANT.

ROBERT RAE,
Pro Appellant.

Central Publishing House Print, 84, 86 and 88 Dearborn St., Chicago.

United States Supreme Court.

IN ADMIRALTY.

THE GALENA, DUBUQUE, DUNLEITH & MINNESOTA PACKET COMPANY, *vs.* SO MUCH OF THE ROCK ISLAND RAILROAD BRIDGE, etc., The Mississippi & Missouri Railroad Co., Claimants.	*United States Cir. Court for the Northern Dist. of Illinois.* IN ADMIRALTY.

ARGUMENT.

The libelant complains in his libel, and so articulates, that the Rock Island Bridge obstructs the free navigation of the Mississippi River; and that by reason of said obstruction he has suffered damage to the extent of some SEVENTY-FIVE THOUSAND DOLLARS. That, by public law and private right, the channel of said River should be kept free to the navigators of said River; and that both rights have been invaded by the parties, whoever they may be, who have erected or caused the erection of the Bridge.

The special damage he has suffered entitles him to maintain this suit.

The proceedings being *in rem*, a claim is filed by the Mississippi and Missouri Railroad Company, the Chicago and Rock Island Railroad Company, and A. C. Flagg, trustee of the mortgagees of said bridge, claiming the right to intervene for their several interests; and no stipulation is filed, or offered to be filed, by said parties.

Exceptions were filed as to their right to appear as claimants and their manner of appearing, which were overruled; and exception and appeal taken to the ruling of the Court.

The claimants except to the Court exercising jurisdiction *in rem*, which exception is sustained *pro forma;* and the case is now before your Honors upon appeal.

The exceptions themselves sufficiently specify the grounds upon which the libelant relies for the dismissal of the claims as they at present stand filed.

Third parties who claim to intervene for their interests may do so, without giving security to the preceding libelants; but if they desire to oppose or to postpone the parties, and carry on a protracted and expensive litigation, they ought to give some stipulation that will indemnify the parties against the dangers and perils of this delay. (34, Rules U. S. Supreme Court in Admiralty.)

The proceeding is not against *them;* and no decree could be rendered against them, unless they submitted to the jurisdiction of the Court by stipulation to pay whatever sum of money should be decreed against them. In this very case, part of the bridge proceeded against has been destroyed by fire, since these interveners have put in their claims.

There is an additional reason why parties should give the stipulation required by the rule, and that is, that the Bridge Company is not *in esse*, and, in the case of the destruction of the bridge or in case subsequent collisions occur, there is no person or thing to whom we can look for indemnity.

The character in which these parties appear claiming, is somewhat startling. Unexplained, it appears like a creation of conveyancing subtlety contrived to escape personal liability to make satisfaction for the great wrong which the community must ever suffer at the continuance of this obstruction.

The first of these paper earth-works, is a perpetual lease, from the Bridge Company, made to the Rock Island Railroad Company, before the bridge was built, conveying all the powers of the Bridge Company under its charter to the Rock Island Railroad Company, to be used, exercised and enjoyed by the Rock Island Railroad Company *in the name* of the Bridge Company. This lease is given in consideration that the Rock Island Railroad Company "will, at its own proper costs and charges, proceed immediately with the construction of the bridge contemplated and provided for in said act, and jointly with the Mississippi and Missouri Railroad Company complete the same, according to the provisions, true intent and meaning of the said act, and forever afterwards maintain the same." Then follows a clause obliging the Rock Island Railroad Company to "indemnify and hold harmless the Bridge Company for all damages, suits, actions, &c., in any manner arising from or growing out of the construction, maintainance and use of said bridge in the exercise of any franchises, &c., herein and hereby devised."

What does this mean? It means that the Bridge Company

shall not be required to raise one dollar of stock; but that they have forever leased their franchises, and authorized another to build the bridge in their name, without requiring or reserving a dollar of rent; mortgage the bridge for its value; and then a Bridge Company without a bridge, without a dollar of stock, or a dollar of assets, or claim for profits, or any other corporeal or incorporeal hereditament, stands forth a beggar to be sued whenever others are reduced to like beggary by this most monstrous fraud and trespass against the rights of all those interested in the free navigation of this river.

If the Rock Island Railroad Company is simply a lessee, it is a lessee in possession, and therefore *pro hac vice* owner.

If it is a mortgagee in possession, then it is *pro hac vice* owner, (Thomas vs. Osborn, 19 How, p. 22,) and as such, should claim *as owner*, and not as *intervener*.

The next claim is a claim made by the Mississippi and Missouri Railroad Company. This claim is founded upon an agreement in which it is provided that the Bridge Company shall have a right to hold by lease so much of said bridge as lies in the State of Iowa, upon the failure to pay interest or principal upon one-half of the amount which it cost to build the bridge. That portion of the bridge is not libeled, and there is no allegation that there is any principal or interest due; or, that if due, any default has occurred; so that there is no interest in this Company that the Court is called on to protect, and as a consequence, the party can only intervene to protect such interest as requires protection.

There is another provision in this singular paper, and that is: if the Rock Island Railroad Company do not pay their proportion of the principal due for building the bridge, that the Bridge

Company shall have the same right to enter and hold the part libeled.

The Bridge Company is to hold the bridge, under this lease, not for its own protection, but for the use of the party paying the interest and principal, until the defaulting Company pays up. But there is no allegation that there is a single dollar due or to grow due, and unless there is, this Railroad Company have not a single cent's interest as to who is the owner of this portion of the bridge.

Flagg claims as mortgagee, but there is no allegation that there are any bonds out-standing, or any sums of money due under said mortgage, and in the absence of such an allegation, that he has some interest to protect, Flagg stands as a mere naked trustee or mortgagee, holding no interest. Surely such a party should not intervene to postpone libelant from proceeding against the property which has injured him.

The Bridge Company does not appear, and, permits the court, without objection, to proceed in the manner promoted by the libelant. It does not appear that the several mortgages were recorded under the laws of the State of Illinois or Iowa; and therefore, third parties have nothing to do with them, and cannot be affected by them.

Next as to the proceedings *in rem.*

A part only of the bridge is libeled: "so much of the bridge, "its tackle, apparel, furniture, piers, stones, railroads, tracks, "flooring, appurtenances, and hereditaments, situate at Rock "Island, in the State of Illinois, now in, upon and over the "channel of the Mississippi river as lies within the jurisdiction "of the Northern District of Illinois, in a cause civil and "maritime."

It is this part of the bridge which is wholly disconnected with either shore, and rests solely in the bed and channel of the river, and over the deepest channel, and directly over the usual track of steamboats before the bridge was built.

By their plea to the jurisdiction, they admit the facts as alleged in the libel.

There is no one claiming the bridge, as the owner thereof.

The libel alleges, *inter alia*, that the steamboats, the property of the libelant, "then moving near to said bridge, at a careful and prudent rate of speed, were without any fault on the part of the libelant or its agents, or through any fault of the steamboats, thrown by the improper obstruction of navigation in said river occasioned by the piers of said bridge in the current and channel of said river, within the district, and at a point navigable for vessels of ten tons burthen and upwards, and within the Admiralty jurisdiction of the United States against the turn-table pier of said bridge."

The steamboats were enrolled and licensed, and at the time engaged in commerce between different States, and under the protection, and subject to the Admiralty jurisdiction of the United States.

The facts, as pleaded and admitted, make out a clear case of nuisance, and the point at which the nuisance occurs is within the Admiralty jurisdiction of the United States.

The charter of the Bridge Company did not authorize the

Company to build such a bridge, and it is there without authority of law. The Bridge Company could not own, and therefore could not transfer any property in it to the Rock Island Railroad Company, —and the Mississippi and Missouri Railroad Company own only the half not libeled, and their rights will be as well preserved whether one party or another owns the Illinois side.

The action is not brought to remove the obstruction, but simply for compensation and indemnity for loss occasioned by the obstruction.

No one claims to own the bridge, and the libelant is left to take the bridge as his only indemnity.

Chancery has no power to interfere, nor have the common law courts any power to seize the "offending thing" and condemn it; so that, if he has not his remedy here, it presents the strange anomaly, that where no other court can afford the particular relief in a case confessedly within the Admiralty jurisdiction *in personam*, (case of the Superior 23, How. p. 26,) where its usual and well known process affords ample and efficient relief, that that process should be withheld when the *tort* is within the Admiralty jurisdiction, and the occasion arises which makes such an exercise of its powers eminently proper.

Judge Nelson says, in the case of the Lexington, (6 How. p. 392,) "some question was made in the argument founded on the circumstances that this was a suit *in personam*. The answer is, if the cause is a maritime cause, subject to the Admiralty cognizance, the jurisdiction is complete over the person as well as over the ship. It must in its nature be complete, for it cannot be confined to the use of on of the remedies on the contract,

when the contract itself is within its cognizance." See also the case of the Sandwich, (1 Peters, Ad. 233.)

There can be found no case expressly in point. In England the jurisdiction commenced below the bridges, and no case of *tort* was cognizable in the Admiralty courts of that country which occurred *infra corpus comitatus.* Until the case of Waring *vs.* Clark, (5 How.) no such case could have been sustained in the American Admiralty. Since that time, upon our navigable rivers, "the offending thing" is liable, independent of the question whether it was a maritime thing or not—locality alone determining the jurisdiction, and with the jurisdiction all processes well known to, and used by the practice of that forum (Prop. Commerce, 1 Black., p. 380). The lien was given, not because the offending thing was a vessel, but because an "arrest offers the greatest security for obtaining substantial justice, or furnishing a security for prompt and immediate payment," (Volant, 1, W. Rob. p. 388). The reason of the rule was, that the owner in such cases was likely to go beyond seas, and out of the reach of civil process, and *a fortiori,* the rule applies when the owner is *non est.*

In the case of the Magnolia, (20 How. 305) Judge McLean said: "it is true that the Magnolia was engaged in a commerce strictly within the State, but this does not exonerate her, as the trespass was on a vessel protected by the Admiralty law. Losses have frequently occured in the Ohio and Mississippi rivers where steamboats, have run down and sunk flatboats, were held responsible for the injury in the Admiralty. And, if a steamer is liable in such cases, a remedy for an injury done to it cannot be withheld in the same court."

Again: It may be said that the bridge is attached to, and is

a part of the land and can no more be libeled than a wharf,—that the Admiralty jurisdiction is limited in cases of *tort, by locality.*

In the first place, the libel does not so allege it, and a bridge is not a wharf. A wharf is an appurtenance and appendage to the shore. It is the shore, adapted to commercial wants. A wharf is the shore. A bridge is not a shore. Therefore a bridge and a shore are not the same. A bridge is over or on the stream, and a vessel is over or on the stream. The bridge rests on the bottom of the river, and vessels at times rest there, and at other times float upon the water which rests upon the bed of the river. A column of water which rests upon the bed sustains the vessel. A column of masonry, resting upon the same bed, sustains the bridge. If one is within the Admiralty jurisdiction the other must be—a floating bridge must be—a bridge aground would be also.

But what if the *termini* of the bridge should rest upon or be attached to either shore?—this is not more so than a vessel chained to a spile driven into the shore.

The shore is not the principal thing, but the incident. There was no need of an act of the Legislature to authorize the riparian owners to construct, or improve the shore, but it was necessary, in order to construct *a bridge;*—so that the principal thing is the bridge, and the principal thing is over the waters of the United States, and within the Admiralty jurisdiction. The pier which the steamboats struck was in the bed of the channel, and "the admiralty hath jurisdiction of the bed of navigable rivers;" and in the case of a beacon, stone structure, in the English Channel, upon which a light-house was erected, it was held in England to be within the Admiralty jurisdiction (1 *Sid. p.* 158, 2 *Black. Com.* 108.) So it has been held that spiles driven into

the Chesapeake Bay, so that a vessel impinged thereon, was within the jurisdiction, although they were driven into the bed and soil of the river. So, the running foul of an anchor is within the jurisdiction, and both the vessel and the anchor are liable *in rem* to make good the loss.

There is, so far then, nothing in the objection, that this proceeding only extends to things *flotsam* and not to those things lying in or on the soil of the river.

Take the case of a vessel sunk in the channel of a navigable river, and across the stream, so that its bow rested on one shore and its stern on the other, and a platform or bridge built on it for the purpose of crossing, and the whole sunk in the bed of the river. Here the vessel has ceased to have any of the functions of a maritime thing. Would any one suppose that such an obstruction would not be liable *in rem* for an injury done to a vessel thrown against it? Suppose that man should place a mass of silver or gold, or any other substance of value, in the channel of a navigable stream, and a vessel should impinge upon it—would not the *res* be liable to make good the loss?

If rafts, logs, &c., are liable when floating, they should be liable when stationary. If liable when rude from the forest, they should be liable when shaped into rafts and spiles in the bed of a channel of a navigable river. Any injury done by the vessel to these, or to a bridge, would be followed by a suit against the vessel, the "offending thing," and the reciprocal obligations which the law always creates and recognizes in justice would compel the understanding to approve the justness of the claim of the vessel to like indemnity.

A bridge can never be made liable unless it encroaches upon the rights of navigation; and no person can authorise an erection that materially affects this right.

The language of the respondents is; it is true you have a lien against the "offending thing," if that offending thing is a vessel!

It is conceded that we would not have a lien upon a dwelling house, nor would it be necessary to discuss it, unless some one should build a dwelling house in the channel of a navigable river or in the midst of the wild and wasteful ocean. If a party, however, should approach upon, or in the midst of these great highways with any object which would occasion a marine trespass, upon principle and authority, we should claim that, whether it came in the form of an ark, "the dwelling house of every living thing on the face of the globe," or in the shape of a winged thing of life and beauty, like a clipper-ship, would be liable, *in rem*, to make good the injury.

The respondents may build a bridge in the channel of the river; they may drive spiles into its bed; they may float their bridge or make it of solid masonry—all this they may do lawfully, but they must not materially obstruct the navigation. Every stone, every spile put there so obstructing, is not a bridge, or the part of a bridge, but a *nuisance*—a trespass against the public—against all mankind—a marine trespass; and he who suffers special damage can sue in the Admiralty, and as a consequence, can use that process which will afford him the best security and the most speedy relief.

As the Admiralty jurisdiction depends upon *locality* and not upon subject matter—to make it depend upon the *object* and not upon locality, would lead to a confusion of ideas most distressing and perplexing to suitors. The principle of jurisdiction in cases of *tort* ought to depend upon *locality* and not upon the *object affected*. Like crime it is essentially local. Torts and trespasses, like murder or arson, have the same elementary attributes on land

as on sea, and there is necessarily no other line by which to divide marine tort and marine offenses, but by locality. In Mon. vs. Almedia (10 Wheat.) the court intimate, that if the property *i. e.* dollars, specie, had been within the jurisdiction, as the wrong complained of was a maritime trespass, the proceeding *in rem* would have been enforced. Yet, specie is no more a vessel than a bridge. Here the court looked to *locality*, and not to the object, and asserted their right to arrest it.

It may not be a good reason that because we have an acknowledged Admiralty lien upon the offending thing in a case of collision, that we have a like lien for the premium on a policy of insurance upon the hull; but it is a valid reason that because we have a lien upon one offending thing, we should have a like lien upon another offending thing similarly situated.

The learned judge, Dr. Lushington, says, in the case of the Volant, "the jurisdiction of this court does not depend upon the existence of the *ship*, but upon the origin of the questions to be decided, and the *locality*," (1 W. Rob. p. 388.) Nor is jurisdiction confined to maritime persons, (the Rockias 4 C. Rob. 76, Chamberlin vs. Chandler, 3 Mason 242. King vs. S. B. Newworld, 16 How.)

In the case of the Dundee, (1 Hagg, 8 p. 124–5,) the vessel, her boats, tackle and furniture, and fishing tackle, consisting of oil casks, harpoons, &c., the usual outfit of a whaler, were attached to answer a claim for damage arising out of a collision. The act of the Georges limited the liability of the owner to the vessel and her appurtenances; and the question arose whether, the term appurtenances included the fishing outfit. The court say, in deciding it, "that the ancient formula of ship, tackle, apparel and furniture, affected *all the property of every kind*, belonging to the owners. That the initiatory terms 'tackle, apparel and furniture'

founded the suit sufficiently to enable it to embrace *all the effects* which the statutes left subject to its operation. The same words went as far as the general law, notwithstanding the narrowness of these terms."

That is—the general law held the whole of the trespasser's property liable, of every kind and value. The writ for imdemnity was co-extensive with this obligation, and, although in form limited to ship, tackle, apparel and furniture, yet, in legal contemplation it went against all his property, including goods, effects and credits—indeed every thing but land.

In cases arising upon contracts, we are told that subject matter alone determines the jurisdiction; and for this reason we find, not only ships libeled, but logs of mahogany, assorted cargoes, and every species of property, where the contract gives a lien upon the property proceeded against.

Liens arising out of contracts are *stricti juris*. Yet, we find, in France, where this dictum first had its origin, that this doctrine could only apply to cases where such liens existed simply by the force of ordinance or statutes, and not to those of pretorian origin, or what in our law would be termed common-law origin. All liens asserted upon the equity of the right, were termed *bona fidei*, i. e. the judge needed no exception to enable him to consider the equitable circumstances of the case. (Saunders' Justinian 519.)

In France, Valin gives the enumeration of such cases where liens exist, and then extends them to cases not enumerated—because within the reason and spirit of the rule—such as goods sold from necessity, lenders of money for the outfit of sailors, and boarding-house keepers, although none of these are so nominated in the law conferring liens; and Emerigon adopts this construc-

tion when consulted on the question, whether the material-man who furnishes cordage and timber had the same lien as the lender of money to pay for them, and he answers that he had—though it is the lender who alone is named. Domat argues the same way, (Title 1, Sect. 2, p. 125.) The United States Supreme Court, in Thomas vs. Osborn, decide in conformity with this reasoning, (19 How.) The cases and persons enumerated, are to be considered as named by way of example, and not of limitation—just as in the Rhodian law of general average, *jactus* alone is named; so, the subrogated right of the underwriters upon paying the shipper's loss, although the law only speaks of the goods to the vessel and the vessel to the goods—so, the owner of a Tug is regarded as a material-man.

The claim, that the owner of the injured vessel has for such trespass, is of the highest and most sacred order. It is said that the Admiralty regards with the greatest favor the lien of the mariner. Yet the claim of the injured owner is superior even to that of the mariner. It is a favorite maxim of maritime law, that the courts will use nice subtlety to maintain a Bottomry Bond, and when once established is carefully guarded: yet this lien overrides a Bottomry Bond; Pilotage, Towage, Prior-Salvage —all yield to this most favored preference.

Here the libelant had no option, he must suffer the trespass standing in the way of the vessel, and the vessel could not get out of the way.

No owner claims it, and it is guarded from working satisfaction to each sufferer by incumbrances which far exceed its value. Litigation in a common law court is a mockery. In chancery the court is powerless, for it follows the law. Admiralty alone

can deal with this "offending thing" by giving satisfaction to the injured party.

So jealous was the common law jurisdiction of any thing affecting the fees of the judges, that a stipulation in Admiralty could not be enforced there, but must be enforced in a common law tribunal, until, from the necesity of the thing, the right to sue in Admiralty upon its own stipulations was finally conceeded by the common law judges.

The same spirit of jealousy denied the Admiralty jurisdiction of collision in the Thames; and if there was anything settled at common law, it was, that all *torts* committed *in fra corpus comitatus* were alone cognizable in Westminster. Yet in the case of Wharton vs. Pratt (2 Stalk, p. 548, 6 Viner ab. p. 534,) which was an application for a prohibition to the Admiralty, in case of a libel filed against the master and ship, for a collision happening upon the Thames. The libelant then informed the common law court, that the defendant would not appear, so that he could not have an action at law, and thereupon the court refused to grant the prohibition, unless the defendant would appear and give bail.

In the case at bar, no one appears and claims to own the bridge and, as a consequence, we can not have an action at law.

Let the court adopt the rule which the present great judge of the high court of Admiralty in England adopted in the Rosalie; "if I am to acknowledge myself," says Dr. Lushington, "bound hand and foot, and totally helpless to do justice on the present occasion—who is to do it? If I were in any difficulty I would adopt the common law principle, and not throw off the jurisdiction unless there was another to take cognizance of the case," (25 Law and Equity 608.)

This is a *tort* on the navigable waters of the United States, and within its Admiralty jurisdiction. It is so by the constitution of the United States, and the railroad companies, nor the bridge company, by their acts or charters, cannot take it away.

It is a *tort* not concerning a locomotive or a carriage, but concerning an enrolled and licensed vessel,engaged in the commerce of trade between several States, by which the vessel has been sunk, her cargo lost or damaged, and the lives of her passengers and crew destroyed. If it is the first case, it is a just one, and within every reason and spirit of the laws that would furnish a lien upon any other property committing a like trespass.

R. RAE,
Proctor for Libelant.

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